

The New Otani Hotel & Garden and Hotel Employees and Restaurant Employees Union, Local 11, Hotel Employees and Restaurant Employees International Union AFL-CIO. Case 21-CA-30841

June 17, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND HURTGEN

On August 7, 1997, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We affirm the judge's conclusion that the General Counsel has failed to meet his burden of proving that the discharge of three housekeepers violated Sec. 8(a)(3). We do not rely on, however, the judge's suggestion that direct evidence of animus is a requisite element of the General Counsel's case or that unlawful motivation may not be proven by an inference drawn from evidence of blatantly disparate treatment. The Board has repeatedly stated both that, "[u]nder certain circumstances, [it] will infer animus in the absence of direct evidence" and that evidence of a "blatant disparity is sufficient to support a prima facie case of discrimination." *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991). Also see *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In the present case, the record as a whole does not warrant any inference of antiunion motivation for the discharges.

Ami Silverman, Esq., for the General Counsel.
R. DeWitt Kirwan and Michael J. Crowley, Esqs. (Pillsbury Madison & Sutor), of Los Angeles, California, for the Respondent.

Jennifer Skurnik, Staff Director, Local 11, of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this unfair labor practice prosecution in 4 consecutive days of trial proceedings held in Los Angeles, California, ending

on October 3, 1996. The General Counsel and the Respondent thereafter filed thorough and helpful posttrial briefs. I deny the Charging Party's motion to reopen the record, dated July 24, 1997, and received in my office on July 29, 1997.¹ My reasons are set forth in the memorandum opinion, I have appended to this decision, which is probably best digested only after first reading this decision.

The case arose and came to trial as follows: On February 21, 1995,² the New Otani Hotel and Garden (the Respondent), discharged three of the its longtime housekeeping employees, Ana Alvarado, Margarita Salinas, and Juventina Barajas. The Respondent's asserted reason was that it had concluded after investigation that the three workers had been mutually involved in violating the Respondent's well-known prohibition against one employee's punching-in another's timecard, an illicit practice that I will usually refer to below for shorthand purposes as "proxy-punching."

Nearly 6 months later, on August 7, Hotel Employees and Restaurant Employees Union, Local 11³ (the Union) filed an unfair labor practice charge over these dismissals. (The Union amended that charge in an insignificant respect on August 11.⁴) On April 30, 1996, following an 8-month period of investigation and consideration, the Regional Director for Region 21 issued a complaint and notice of hearing in the name of the General Counsel of the National Labor Relations Board, alleging that the firing of the three workers involved unlawful discrimination against them because of their union activities, and thereby violated Section 8(a)(3) and, derivatively, Section 8(a)(1) of the National Labor Relations Act.⁵ The complaint alleges no other violations.

The Respondent has always denied that it fired the three for unlawful reasons, or for any reasons other than its originally asserted reasons. But the Respondent admits in its original or amended answer, and I find, that the original

¹ The motion to reopen the record, which arrived as this decision was in the final stages of preparation, is signed by Jennifer Skurnik, a staff representative of the Charging Party (the Union), who also appeared as the Union's trial representative. In substance, Ms. Skurnik avers that the Union has recently obtained evidence of certain events arising in May and June 1997 (events that are specified to a limited degree in an offer of proof) which, she argues, would tend to show that the three alleged discriminatees here were the victims of "disparate treatment" when they were fired some 30 months earlier, on February 21, 1995.

² All dates below are in 1995 unless I say otherwise.

³ Affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO.

⁴ The firing of the three housekeepers was the only target of the original and amended charges. Indeed, the amended charge was identical to the original charge except that it identified both the Respondent and an entity called "East West Development Corp." as the "Employers."

⁵ In pertinent part Sec. 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Sec. 8(a)(1) outlaws employer actions and statements that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" (Sec. 7 declares pertinently that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]")

charge was served on it by certified mail on August 8,⁶ that is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,⁷ and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On my study of the whole record, the parties' briefs, and my assessments of the credibility of the witnesses and the inherent probabilities, I will judge, employing a *Wright Line* analysis,⁸ that the General Counsel's showing was insufficient to persuasively establish that the union activities of the three housekeepers were a motivating factor in the Respondent's decision to fire them. Therefore, I will dismiss the complaint on this basis, without reaching the question whether the Respondent has adequately demonstrated in any case that it would have discharged the three workers even if they had not been involved in union activities.

Main Findings⁹

I. THE WORKPLACE AND THE CENTRAL ACTORS

The Respondent operates a hotel and restaurant complex, the New Otani, in the "Little Tokyo" area of downtown Los

⁶The Respondent's answer avers as an affirmative defense under Sec. 10(b) of the Act that "[m]aintenance of this action is barred to the extent that the Union seeks relief for any alleged unfair labor practices . . . which did not accrue within six months before the commencement of this action." This defense is obviously couched in the conditional mood, and the Respondent has never directly argued that the Union's charge, i.e., the procedural event that marked the "commencement of this action," was not filed and served within the 6 months limitations period prescribed in Sec. 10(b). Because the Respondent admits that the discharge of the employees occurred on February 21, and that the charge was filed on August 7 and served on August 8 (i.e., with about 13 days to spare before the expiration of the limitations period), I find that the complaint is not barred by Sec. 10(b).

The Respondent's answer also avers as affirmative defenses that the complaint is barred by (a) the Union's "failure to exercise due diligence in discovering the facts underlying the alleged claims"; (b) "laches"; (c) "unclean hands," and (d) "estoppel." The Respondent introduced no evidence to support any of these claims, has never particularized them, and, indeed, appears to have abandoned them. Accordingly, I will not address them further.

⁷The Respondent's answer further admits, and I find, as follows: The Respondent, a California corporation, owns and operates the New Otani Hotel and Garden in Los Angeles. In the year ending December 12, 1995, its gross revenues from that operation exceeded \$500,000. In the same period it purchased and received more than \$50,000 worth of goods directly from points outside California.

⁸*Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁹For reasons separately discussed below, my main findings will not address the question of the alleged discriminatees' actual guilt or innocence of proxy-punching. In addition, my main findings will not address, except in one instance, the evidence on which the General Counsel relies to argue that the Respondent bears an antiunion "animus," nor the evidence cited by the prosecution for the proposition that the alleged discriminatees were the victims of "disparate treatment." I will make supplemental findings bearing on those latter questions as part of my concluding analyses.

Unless I specify otherwise, all of my findings in this decision are based on essentially undisputed testimony and documents of record. Moreover, except as I may note otherwise, my findings are substantially echoed in the versions of the facts variously set forth in both the General Counsel's and the Respondent's posttrial briefs, even

Angeles. In early 1995 it had a total staff of about 350 persons, of which about 275 were hourly paid employees who worked in various departments associated either with hotel services or with the several restaurants and bars in the hotel. Kenji Yoshimoto was the general manager of the combined hotel and food and beverage operation, a position he had held for about 10 years as of early 1995.

No employee of the New Otani may be discharged without Yoshimoto's personal approval and authorization, and it was Yoshimoto who made the decision on February 21 to fire housekeeping department workers Ana Alvarado, Juventina Barajas, and Margarita Salinas for their supposed violation of the rule against proxy-punching. (The rule in question is simple: "Employees punch only their own cards. Violators are subject to immediate dismissal." Moreover, the record overwhelmingly shows that the rule has been well publicized and that the three alleged discriminatees were quite aware of it.¹⁰) In the same period, Dortha Balabus was the Respondent's director of human resources. Balabus reported directly to Yoshimoto, as did the directors of about six other main departments. Balabus was the leading figure in an investigation into the alleged proxy-punching by the three housekeepers, and it was she who reported the results to Yoshimoto, who concurred in her opinion that the trio was guilty of proxy-punching and in her recommendation that their dismissal was the appropriate penalty.

The three alleged discriminatees had each worked in the housekeeping department for about 16 years. At material times their immediate supervisor was Pat Chui, the executive housekeeper. A total of about 64 employees worked in housekeeping in early 1995—some, like Salinas and Barajas, as room maids; some, like Alvarado, as floor supervisors¹¹; and some in various other capacities. One of these latter was

though their terms of characterization may not always match my own. To the extent I do not comment about certain facts or alleged facts urged by either party on brief, it is either because I was not persuaded by the underlying testimony or because I regard such facts as irrelevant or merely cumulative.

¹⁰The undisputed record, unnecessary to detail, shows that the rule against proxy-punching is one of several rules maintained by the Respondent relating to timeclock procedures and honesty in the keeping of time records, and that the rule in its presently worded form went into effect on September 1, 1993, after the Respondent introduced new timeclocks and associated procedures in March 1993. Moreover, the record shows that the rule was well publicized to employees in various staff meetings conducted in advance of its effective date, that, since then, copies of the rule (printed in English, Spanish, and Japanese texts) have been more or less continuously posted near the four timeclocks in the hotel, including on the B-1 level, and that the alleged discriminatees, like the rest of the hourly workers, were, in fact, aware of the rule, not least because each had been given copies of the timeclock rules and procedures, printed in Spanish, and they had each signed an "agreement" acknowledging that they had received and read those copies.

¹¹Although one element of the job of floor supervisor is apparently to make sure that the room maids have properly cleaned the rooms on the floors for which the floor supervisors are responsible, the Respondent does not contend that floor supervisors exercise any powers that would make them "supervisors" within the meaning of Sec. 2(11) of the Act. Accordingly, I will assume that Alvarado, like Salinas and Barajas, operated at all times under the protections afforded by the Act to "employees."

Marcos Hernandez-Reyes, a “lead” utility houseman,¹² and another worker of lengthy tenure, having worked at the New Otani for nearly 15 years at the time the three housekeepers were fired. It was Reyes’ initial report to Chui on February 15 that he had just seen Salinas punch in the timecards of other workers that set in motion a brief preliminary investigation by Chui, soon followed by Balabus’ review and by Yoshimoto’s decision to discharge not only Salinas, but Alvarado and Barajas as well.

II. THE EVENTS OF FEBRUARY 15 THROUGH 21

A. Introduction

It’s worth noting immediately that the three alleged discriminatees denied, both during Chui’s and Balabus’ interviews with them, infra, and as witnesses in this trial, that Salinas had done what Reyes claimed to have seen her do on February 15. Rather, each has insisted that she punched her own card that day, and that Reyes was lying. And it seems to have been important to both parties in the trial to litigate the question of the trio’s actual guilt or innocence in the matter, even though neither party has articulated on brief any argument as to why the answer to the question can matter to the outcome of this case. Thus, the General Counsel and the Respondent each sought to prove through some of their witnesses what it was that Reyes did or did not see, or what it was that the three housekeepers did or did not do, in the minutes before Reyes brought his report to Chui. However, for reasons I discuss next, I judge that the question of the three housekeepers’ actual guilt or innocence, although clearly and understandably important to them and to anyone else interested in simple justice in the workplace, is essentially irrelevant to the question of the Respondent’s guilt or innocence of the unfair labor practice it is charged with committing.

Everyone agrees that Reyes did, in fact, make what proved to be a fateful report that he had seen Salinas punch in the cards of others. But there is no suggestion in the General Counsel’s arguments that Reyes’ report was simply part of some charade, prearranged, somehow, between Reyes and the Respondent’s agents, to supply a phony reason for firing the three alleged discriminatees; indeed, the record contains no evidence that reasonably would allow an inference that any such conspiracy existed. Nor has the General Counsel sought to show that Reyes’ report traced from some personal grudge against the trio or any one of them, much less to show that the Respondent’s actors knew or should have known that his report was inspired by a personal grudge or by any other ulterior motive, if, indeed, it was. In any case the record shows without dispute that it was Reyes’ *unsolicited* report that triggered the Respondent’s investigation, and that this report, whether truthful or not, was, in fact, believed and relied on in turn by Chui, Balabus, and Yoshimoto as a central consideration in their common judgment that the trio was guilty of proxy-punching.

Moreover, although the prosecution brief makes what I regard as inconclusive collateral attacks on the quality of the “investigations” conducted, in turn, by Chui and Balabus in the aftermath of Reyes’ report, the prosecution’s ultimate

¹² No one claims that Reyes had Sec. 2(11) powers, nor does the record suggest it.

claims in this case depend not at all on a finding that Reyes’ report about Salinas was, in fact, a false one, or that the alleged discriminatees each did, in fact, punch in their own timecards after lunch on February 15, nor even on a finding (which I could not make on this record in any event) that any arguable deficiencies in Chui’s and Balabus’ investigations were traceable to antiunion animus. Rather, the General Counsel’s ultimate argument is that even though Yoshimoto may have genuinely believed that the trio was guilty of proxy-punching, their supposed misconduct would not alone have accounted for Yoshimoto’s “draconian” decision to fire them, absent a supposed hostility to their having participated in union activities.

In short, the outcome of this case does not turn on whether the trio—or any one of them—was or was not guilty, “in fact,” of the misconduct for which they were assertedly discharged.¹³ Instead, as all parties recognize, this is a case which “turns on employer motivation,” and therefore requires analysis according to Wright Line’s teachings.¹⁴

Here, as all parties likewise recognize, it is ultimately Yoshimoto’s motives on which we must focus, because he made the decision to fire the trio.¹⁵ And it is clearly relevant to assessing Yoshimoto’s motives to determine in the first instance whether or not he honestly believed that the three were commonly guilty of proxy-punching. Thus, if the record reasonably allowed a finding that Yoshimoto did not have such an honest belief, this would suggest an ulterior motive, and this, in turn, might go some distance toward satisfying the General Counsel’s *Wright Line* burden of showing that the ulterior motive was an *unlawful* one. But I am satisfied

¹³ By contrast, see *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), where the Supreme Court, affirming the analytical scheme used by the Board in *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952), held that the disciplining or discharge of an employee for supposed misconduct “in the course of” engaging in statutorily protected activity will be found to violate Sec. 8(a)(1), without regard to the honesty of the employer’s belief of misconduct, if the General Counsel establishes that the employee “was not, in fact, guilty of that misconduct.” See also, e.g., *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990), echoing and reaffirming this rationale, and further holding that the Court’s reasoning “extends to all cases in which employees are erroneously disciplined or discharged because of alleged misconduct arising out of protected activities that are known to the employer.”

Here, however, there is not the slightest suggestion from any quarter that the “misconduct” attributed to the three housekeepers, their alleged proxy-punching, occurred “in the course of,” or “arose out of,” any activity protected by the Act.

¹⁴ The Board announced in *Wright Line* (251 NLRB at 1089), that it would,

henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

¹⁵ “In assessing allegations that conduct directed against employees has been unlawfully motivated, the crucial inquiry must be directed to the state of mind of the official who made the decision[.]” *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), and authorities cited. See also, e.g., *Guarantee Savings & Loan*, 274 NLRB 676, 678–679 (1985).

that the evidence overwhelmingly supports a finding that Yoshimoto honestly believed, based on reports he had no apparent basis for doubting, that the employees were guilty of complicity in a proxy-punching arrangement. And while this finding is not dispositive of the discrimination issue, it serves at least to shift the contest, and the nature of the General Counsel's burden, to a different arena, where, to prevail even at the threshold, the General Counsel must make a showing by a preponderance of credible evidence that, despite Yoshimoto's honest belief of their misconduct, his decision to fire the three was nevertheless tainted in some manner by their prior union activities. (Indeed, as I have already noted, this is the General Counsel's ultimate argument—that Yoshimoto's "draconian" decision to fire them, rather than impose some lesser punishment, or none at all, was tainted by his supposed hostility to their union activities.) Again, however, absent a showing never made here that Yoshimoto was, in fact, on notice of some evidence that would warrant doubt about the truthfulness of Reyes' report—or some other evidence independently tending to corroborate the trio's claim of mutual innocence—it cannot be relevant to the question of his motives that perhaps, in fact, the trio was innocent, after all.

Accordingly, in the circumstances described above, I deem it unnecessary to decide the question of whether or not, in fact, the trio, or any one of them, was guilty of the proxy-punching reported by Reyes. Rather, my findings in this section will focus instead on what it was that Reyes reported to Chui, and on what it was that Chui, Balabus, and Yoshimoto did about the report thereafter. And these are matters about which there is no material dispute among the parties, even though their respective witnesses had predictably variant memories as to many details.

B. February 15¹⁶

Shortly before 1:30 p.m. on February 15, utility houseman Reyes entered Executive Housekeeper Chui's office, located on the "B-1" basement level of the hotel, near the timeclock used by the housekeeping employees, among others.¹⁷ He then asked Chui in halting and awkward English if she thought it was "fair" to the other employees for one worker to punch another's timecard, and soon communicated to her that he had just seen Salinas punching in the cards of more than one other worker. (Perhaps he specified that Salinas had punched in the timecards of "two other workers";¹⁸ but he

did not claim to have seen the names on any of the cards he had seen Salinas punch in.) Chui asked Reyes if he was sure about what he had seen, and he said he was. Chui and Reyes then went to Chui's office doorway and looked down the hall toward the timeclock. They saw Salinas standing near the timeclock, and also saw another housekeeper, Margarita Ochoa, walking from the timeclock toward the nearby entrance to the women's locker room.

Chui waited briefly until Salinas, too, walked into the locker room; then Chui went to the timecard rack and began to pull timecards from it, scanning first for cards that showed punch-in times proximate to the one on Salinas' card, which itself showed a punch-in at 1:25. (It is evident from Chui's focus, and I find, that Chui was proceeding on the belief that Reyes had, in fact, seen Salinas punching in others' cards.) Chui eventually pulled three other cards that seemed to fit the parameters of her search, those of Alvarado, Barajas, and Ochoa, each of which showed punch-in times of 1:26. (Because the timeclock registers time only to the minute, Chui reasoned that Salinas could well have punched in her own card only seconds before the timeclock moved from 1:25 to 1:26, and then punched in the others' cards only seconds after that moment.)

In the next 30–45 minutes, Chui spent most of her time first making photocopies of all the 64 timecards in the rack, and then reviewing these copies, with particular attention to the 4 timecards she had initially retrieved from the rack, including Ochoa's. However, the fact that Chui had seen Ochoa in the vicinity of the timeclock immediately after first hearing Reyes' report made Chui doubt that Salinas or anyone else had punched in Ochoa's card for her. And this, coupled with other considerations discussed next, soon led Chui to exclude Ochoa as a suspect in a proxy-punching scheme and to focus more closely on Alvarado and Barajas as the likely ones whose cards Reyes had seen Salinas punch in. Thus, whereas Ochoa's card had been punched out for lunch at 1:04 p.m., the cards of Salinas, Alvarado, and Barajas showed identical punchout times of 12:59 p.m., suggesting that the suspect trio had all gone to lunch together that day (as, in fact, they had, which was their typical practice when they worked the same shift, as Chui knew). Beyond that, on further review of the lunchtime punchouts and punch-ins of the suspect trio over the previous 2 weeks, Chui noticed that these times were virtually identical on each of the days the three had worked together.¹⁹ She also noticed, by contrast,

punching in one timecard, then saw her replace the first timecard in the rack and pull out two more timecards, which he both saw and heard her punch in on the timeclock. What remains unclear is whether he described these observations with the same degree of specificity when he made his initial report to Chui.

¹⁹The relevant timecards of the trio (and those of many other housekeeping employees covering the same 2-week period) are in evidence as joint exhibits. (Alvarado's card is JX 2; Barajas' is JX 3; Salinas' is JX 6.) I have compared the latter three cards and reach the same conclusion Chui did—that on the 9 days preceding February 15 when the trio worked together, their lunchtime punchout and punch-in times were literally identical in most cases, and virtually identical (i.e., within 1 minute of one another) in the rest of the cases.[*]

[*] I have disregarded an apparent anomaly unique to the February 7 entry on Salinas' card: It appears to show "1:17" as her punchout time even while showing "1:11" for her punch-in time. (The Feb-

Continued

¹⁶For findings in this section, I rely primarily on the harmonious and coherent accounts of company-tendered witnesses Chui, Reyes, Vasquez, and Balabus. The three housekeepers' respective versions of their involvement in some of the events described below are mostly harmonious with those of the Respondent's witnesses, and never wildly at variance with the latter; however, the versions offered by the alleged discriminatees were decidedly more confused and impressionistic, and as to many details, mutually contradictory. Accordingly, I would not rely on any feature in the accounts of any of the three housekeepers to the extent that they are at odds with my findings.

¹⁷It is probable, based on timecard records reviewed *infra*, and on both Reyes' and Chui's harmonious, credible, and uncontradicted accounts of the immediately ensuing events, *infra*, that Reyes' arrival in Chui's office occurred within a minute of the point when the nearby timeclock had ticked-over from 1:25 to 1:26.

¹⁸Reyes specifically testified that, just before entering Chui's office with his report, he passed Salinas in the hallway just as she was

that Ochoa's timecard entries for the same period did not conform with this pattern.²⁰ The apparent pattern disclosed by the suspect trio's timecards not only reinforced Chui's belief that Reyes had been truthful in his initial report, but led her to suspect, moreover, that the trio may have been mutually involved in a more longstanding proxy-punching arrangement.²¹

Chui then summoned Salinas, Alvarado, and Barajas from their work stations upstairs, and they soon appeared in her office, one by one. By the time all three had arrived, it was about 2:15.²² It appears that Chui had a brief and confusing

ruary 7 entries on Alvarado and Barajas' cards, by contrast, show identical punchout times of "1:01" and punch-in times (like Salinas') of "1:11.")

²⁰ Again, I have examined Ochoa's timecard (JX 5), and I concur in Chui's observation that it does not in any way fit the pattern Chui had detected in the timecards of the suspect trio.

²¹ Of course I recognize that, in hindsight, and viewed from afar, there was a circular quality to some features of Chui's professed reasoning of the moment. Thus, it is easy to infer that Chui's awareness that the three housekeepers were constant lunchtime companions influenced her focus on Salinas and Barajas as the likely beneficiaries of any proxy-punching Salinas might have done, and likewise influenced her doubt that Ochoa would be involved. And if this is so, it can be argued quite plausibly that the 2-week "pattern" of nearly simultaneous punchouts and punch-ins that Chui detected in the timecards of the suspect trio would have no *independent* probative significance to Chui, precisely because she already knew that the three customarily took lunchbreaks together, and, therefore, their timecards could be expected to show the same "pattern" even if there had been no proxy-punching among them. But this objection, however valid, does not persuasively show that Chui's reasoning, however flawed, was not her actual reasoning at the time. Much less would it reasonably support the inference that *any* flaws in Chui's reasoning traced from antiunion hostility toward the three. (As I discuss later, there is only the slenderest basis in the record—an equivocal remark made by Chui to Alvarado during an otherwise positive appraisal session nearly 8 months earlier—for inferring that Chui harbored any personal animus against workers in her department who may have favored the Union.) In any event, I think any flaws in Chui's professed chain of reasoning are best explained by her genuine belief from the start in the truthfulness of Reyes' report, which caused her to proceed on the assumption that Salinas had, in fact, just proxy-punched at least two timecards other than her own, and which left in Chui's mind only one question to be answered: *Whose* cards had Salinas punched other than her own?

²² The alleged discriminatees recalled having only one meeting with Chui that day, at about "4:15," at which time, they say, the events occurred that I will find occurred in an initial meeting at 2:15. The three housekeepers further recalled that at this meeting they also received, but refused to sign, the "warning notices," *infra*. I find instead that Chui met twice with the trio that day, first at about 2:15—when, as narrated below, she confronted them and brought in Reyes to reaffirm his accusation against Salinas—and next at about 4:15–4:30, when, on Balabus' instructions, Chui called the trio back to the office and gave them the warning notices and advised them of their suspension pending further investigation. I rely on Chui's, Reyes', and Balabus' memories of the timing and sequence of events that day, and on my own sense of the probabilities. I am persuaded that the three housekeepers were simply mistaken in recalling that there was only one meeting with Chui, and that in their memories, they have simply merged the events of two meetings into one. It is not uncommon for witnesses to do this, and the fact that the three seem to have been common victims of this phenomenon does not by itself suggest to me that they, or any one of them, were consciously lying. However, this and similar confusions or contradictions in their respective accounts, does cause me to doubt the reli-

initial exchange in English with one or more of them, but soon called-in her assistant, Dorina Vasquez, to serve as an English-Spanish translator.²³

With Vasquez translating for the most part, Chui then confronted the trio with her suspicions, asking Barajas initially if she "had a habit of having someone punch her time card." Barajas replied (as translated by Vasquez) that in the past she had sometimes allowed her "friends" to punch her own card in after lunch, simply out of "laz[iness]," i.e., to avoid having to make the elevator trip to the basement timeclock from the employee lunchroom on the ninth floor, then having to return by elevator to an upstairs level to continue cleaning rooms. Salinas and Alvarado reacted to Barajas' admission by snapping their heads in her direction and widening their eyes, and Alvarado, especially, had a severe expression on her face. Chui then posed a similar question to Salinas and Alvarado, who each emphatically denied, in turn, that she had ever done or allowed such a thing. Then Chui, directing her remarks to Salinas, asked whether her answer would be the same if she knew that someone had just "witnessed" her punching others' cards. Salinas replied that this was "impossible," and that the supposed witness would be "lying." Alvarado and Barajas backed her up, saying that they had punched their own cards on returning from lunch that day. Salinas then demanded to know who the supposed witness was. Chui may have mentioned Reyes' name at this point, but in any case, she had Vasquez summon Reyes to her office from his lunchbreak.

After Reyes arrived, he confirmed (mostly speaking in Spanish, with Vasquez as translator) that he had seen Salinas punch-in several cards after lunch. Salinas then had a brief exchange in Spanish with Reyes, during which (as translated to Chui by Vasquez) she called him a liar. (At roughly this point there also may have been some perfunctory mention of a "videotape" by one or more of the participants, but if so, it would be impossible on this record to determine reliably what was said, or by whom.²⁴ In any case, the matter of the

ability of some of their memories of the details occurring within the two meetings.

²³ Chui was born in China, and grew up speaking both the Mandarin and Cantonese dialects; she speaks English with reasonable fluency, however, and English is the language she normally uses in the workplace. She admittedly has little competence in Spanish.

²⁴ While these points are of only incidental interest, they illustrate the degree of variance in the memories of each witness as to tangential details: First, Salinas claimed that after she called Reyes a "liar" in Spanish, Reyes then replied in Spanish, "Shorty [according to the diminutive Salinas, this was Reyes' customary nickname for her] they saw you, they did, through video," which Salinas assumed was a reference to a security video camera mounted on a hallway wall not far from the timeclock. Alvarado, too, recalled that Reyes, addressing Salinas as "Shorty" (i.e., as "Chaparra," the Spanish-feminine counterpart to the English nickname "Shorty") warned her that she had been caught on "videotape." Reyes, however, denied having such an exchange about a videotape with Salinas, and further denied that he had ever referred to Salinas as "Chaparra." Reyes did vaguely recall, however, that Chui may have made some reference to the video camera, and this is perhaps consistent with the mutual recollections of Salinas and Alvarado that one of them asked to see the supposed videotape and that Chui dismissed this request by saying that the video wasn't "important." But to complicate the issue further, Barajas recalled that Chui said (as translated by Vasquez into Spanish) that there was no video of the alleged events. Chui is sure, however, that the subject of the

possible existence of a video record of who did what at the timeclock during the critical minutes around 1:25 proved to be a distraction and a dead end.²⁵ The meeting soon ended, with Reyes continuing to insist that he had seen Salinas proxy-punching others' cards and with Salinas and her fellow suspects continuing to deny this, and to insist, instead, that all three of them had come to the basement after lunch and had each punched their own cards.²⁶

video camera did not come up at all—neither in the 2:15 meeting nor in the 4:15 meeting, *infra*. And Vasquez likewise insisted that none of the participants in the meeting mentioned anything about a video, neither in English nor Spanish.

However, there is no dispute that the subject of a videotape did arise during the trio's meeting on February 17 with Balabus, *infra*.

²⁵The General Counsel subpoenaed from the Respondent, *inter alia*, any videotapes the Respondent might have showing activities at the timeclock on February 15. And when the General Counsel raised the point at the trial's outset, the Respondent's counsel represented that there were no such tapes, and that the camera in question was "down" that day. Also, as I further discuss, *infra*, after Balabus interviewed the suspect trio on February 17, during which the question of the existence of videotape record did arise, Balabus made inquiries and was eventually informed by Chase, the director of engineering, that there was no such record, and that the camera had been malfunctioning.

I note, moreover, that none of the parties sought to independently establish through testimony or other evidence what the video camera in question could or could not see from its perch when in normal operation. Accordingly, we cannot know whether a videotape of events in the area in the critical minutes, if it existed, would be conclusive of the question of the actual guilt or innocence of any or all of the alleged discriminatees.

²⁶Barajas uniquely testified that, at some point during the exchanges in Spanish among the employee-participants, she declared that Reyes had seen her on the B-1 level just before 1:30, whereupon Reyes acknowledged this (in Spanish), but added that he had not witnessed Barajas punch in her own card. Reyes testified that he did not see Barajas or Alvarado on the B-1 level at the time he saw Salinas proxy-punch three cards, and neither did he see either of them in that area at any time in the few minutes that elapsed thereafter, during which he first made his report to Chui, then exited her office and took an elevator back upstairs to continue some work before starting his lunchbreak (which, his timecard shows, he began at 2 p.m.) The General Counsel now relies on Barajas' unique recollections about this supposed exchange in Spanish when she asserts on brief (Br. 19) that Reyes "admitted" during the meeting "that he had seen Barajas on the B-1 level." Barajas' account of the meeting in question was otherwise confused, and in many ways wholly at odds with the recollections of others. Reyes' testimony was, by contrast, far more coherent, and I found him particularly credible when he denied, repeatedly, that he had seen Barajas on the B-1 level at any time in the minutes surrounding his report to Chui. I am not persuaded to a contrary conclusion by an arguably inconsistent "statement" that is contained in an English-language affidavit (G.C. Exh. 5, p. 3, LL 11-15; but see *id.*, LL 5-10) which Reyes signed after being interviewed—in Spanish—by a Board agent on October 25, more than 8 months after the fact. The concluding recitals on the affidavit indicate that its contents were "read" to Reyes by the Board's investigator "in English" before Reyes signed it. Reyes testified in this trial through an interpreter and the record in many incidental ways allows me to find that his grasp of English is quite limited and imperfect. (It may be enough evidence of the point that his interview with the Board agent was conducted in Spanish.) And even if, contrary to the concluding recitals on the English-language affidavit, the Board agent may have "read" an impromptu "translation" of its text back into Spanish before Reyes signed it, his signature on it could not reasonably be taken as evi-

Chui, herself still convinced of Reyes' reliability and of the soundness of her own suspicions after studying the timecards, then reported to Director of Human Relations Balabus what had just transpired, including her own judgment that Reyes was telling the truth about Salinas, and that the timecards tended to back him up and point to Alvarado and Barajas as the workers who had permitted Salinas to proxy-punch their cards. She also reported that the trio had denied being involved in any proxy-punching that day, but that Barajas had more generally admitted to having allowed others to punch in her card in the past.²⁷ Balabus told Chui to suspend the trio pending further investigation, and Chui did so, calling them together into her office near the end of the day, around 4:15, and handing each of them a completed English-language form, captioned, "Warning Notice (Coaching and Counseling Record)," which Vasquez translated into Spanish for Salinas and Barajas, after Alvarado had waived the translation, saying she could read and understand the English text.

Each warning notice contained slightly different wording in the section of the form calling for a description of the "Specific Violation." In the one addressed to Salinas, this entry stated, "You have been witnessed punching in or out other employees' time cards. This is in direct violation to Hotel Policy." In the one addressed to Alvarado, the counterpart entry stated, "You have been witnessed having your time card punched by your fellow worker and you are allowing them to punch your time card for you[.]" again followed by the same admonition that "This is in direct violation to Hotel Policy." The counterpart entry on the warning notice to Barajas stated, "You admitted having fellow employees punch in or out your time card often and your are allowing them to punch your time card for you." This too, was cited as "in direct violation to Hotel Policy." Beyond these particularized messages, the warning notice to each of the three contained identical verbiage, notifying them that they were being suspended for the next 3 workdays, *i.e.*, February 16 through 18, but should report to the Human Resources office on Friday morning, February 17, "for counseling," following which, on Tuesday, February 21, they would be "notified of the result of investigations."

In the meantime that afternoon, Balabus had visited Yoshimoto in his office, where she briefed him about the events as reported to her by Chui, and also told him that she

dence that he "adopted" the affidavit itself. Rather, at best in such event, he would only have "adopted" the Board investigator's (hypothetically assumed) oral translation of the affidavit into Spanish. But where there is no independent record of any such oral translation, we cannot know what it was that Reyes was "adopting" when he affixed his signature to the affidavit. Neither can we know whether the Board agent's (hypothetically assumed) translation was competent.

²⁷I rely here primarily on Chui's credible recollection, even though Balabus did not recall hearing all the details I have just found that Chui reported to her. I note in this regard that Balabus recalled, credibly, that Chui actually had two contacts with Balabus on the afternoon of the 15th—first at about 2:45-3 p.m., where Chui made an initial summary report, and later around 3:45-4 p.m., where she made a followup report that focused on the status of the suspension paperwork, *infra*. I judge it likely that the details I have found that Chui reported to Balabus on the 15th were not furnished in a single coherent narration, but trickled out incidentally during the course of these two communications.

had instructed Chui to suspend the trio pending Balabus' further investigation. Yoshimoto concurred in this action, and instructed Balabus to get another manager to assist her in her own intended review, specifically suggesting Ladd Chase, then the director of engineering for the hotel, who was also filling-in as a "rooms director."

C. Balabus' Investigative Efforts; Her Ultimate Report to Yoshimoto

1. Balabus meets with the suspect trio

At 10:30 on the morning of February 17, a Friday, the three housekeepers appeared in Balabus' office, as previously instructed, where they found Balabus, Chase, and Elena Shinnick, the bilingual laundry director, who would serve as an English-Spanish translator. A priest accompanied the three housekeepers and asked to participate in the meeting, but Balabus said no, and the priest waited in Balabus' office, while everyone else removed to a nearby location. Balabus conducted the meeting and Chase said nothing.

Balabus first took several minutes discussing the rule in question with the trio, and the Respondent's disciplinary procedures in general. She also brought out the "agreements" that each employee had signed when the current timeclock rules and procedures went into effect in 1993, agreements in which each employee had acknowledged by their signatures that they had read and understood the rules. Alvarado and Salinas admitted that they had signed the agreements and knew proxy-punching was against the rules and that it was a "serious" violation that could result in "immediate dismissal." However, when Balabus pulled out the agreement form Barajas had signed, Barajas protested without even looking at the document that she hadn't "signed anything." Then, when Balabus put the signature page in front of Barajas and asked if it was, indeed, her signature at the bottom, Barajas acknowledged it was her signature,²⁸ but began protesting that the document was "in English" (even though, in fact, it was printed in Spanish), and that in any case, she had never read it before signing it. Balabus replied, with evident skepticism, "So be it[.]" and soon asked the three to tell their own side of the story. Each then denied that she had been involved in any proxy-punching on the 15th, and asserted that Reyes was lying when he said otherwise, and that each would be the "witness" to the fact that the others had punched-in their own cards. At some point, Alvarado introduced the name of another potential witness, saying that "Francisca Padilla" (now surnamed Hinojosa) had seen Alvarado punch in her own card. Balabus said words to the effect, "Good, we finally have a witness[.]" and made a note of Padilla's name.²⁹ At some point one or more of the em-

ployees asked to see the "videotape," asserting that it would prove their innocence. This was the first time that Balabus had heard anything about a possible video record and she said she didn't know anything about such a record but would look into it. At some point, the employees complained that they were being "picked-on" and treated unfairly.³⁰ Balabus assured them that their claims would be considered and that a decision would be made and announced to them on the following Tuesday morning, February 21.

2. Other predischarge events

Also on February 17, at Balabus' direction, both Chui and Reyes were interviewed by Cesar Giron, a manager of some kind, who, according to Balabus, was "adept" at English-Spanish translation. After interviewing both Chui and Reyes (the former, apparently, in English; the latter in Spanish), Giron prepared written versions of their statements in English, which each signed, and which Giron then furnished to Balabus.³¹ After this, Balabus met personally with Reyes, using her assistant, Rosa Martinez, as a translator. She asked him, in substance, if he were "comfortable" enough with his account of events to be "willing to come forward" beyond

marks reflecting her own thoughts on this disclosure: ("If indeed she [Padilla] was there she should have witnessed all 3 clock-ins.")

I note further that if Balabus had examined Padilla/Hinojosa's timecard entries for February 15 (which apparently she did not) her skepticism might have deepened; for the timecard (Jt. Exh. 4) shows a punchout time for lunch that day of 1:04, and, more important, a punch-in time of 1:32-5 minutes after Alvarado had supposedly punched herself in.

³⁰ Alvarado was the only witness who recalled that one or more of the employees "told her [Balabus] that there is other people who's doing that, punch another's time card and she said that she knew but nobody was willing to go and to be a witness like Marco Reyes." Balabus was not invited to admit or deny this claim, but she testified elsewhere that, after the meeting, she made some inquiries among the managers as to whether they were aware of any such violations, and that none of them reported any knowledge of such violations. Thus, it is plausible, as Alvarado testified, that someone made some generalized claim in the meeting that "others" were violating the rule, and that Balabus countered by observing that in any other cases, no one had "come forward," like Reyes. What I don't accept in the end, however, is the General Counsel's argument on brief (Br. 45) that Alvarado's testimony can be taken as evidence of an "admission" by Balabus that Balabus was actually "aware" of any other specific instances of a violation of the rule against proxy-punching. And I note that, despite the fact that the three workers may have claimed to Balabus that "others" had violated the rule, they evidently had no such firsthand knowledge either; for although the General Counsel produced witnesses purporting to have some such knowledge, they did not include Salinas, Alvarado, or Barajas.

³¹ These written statements (Jt. Exh. 4) are materially consistent with the accounts offered by Chui and Reyes in the trial, with one exception—Chui's statement shows that she, too, adopted "4:15" as the time when she first met with and confronted the three housekeepers and then brought in Reyes to reaffirm his accusations in their presence. Chui testified, however, that "4:15" was apparently a "typo," and again insisted that the meeting in question occurred at 2:15. Whether or not it was indeed a "typo," or perhaps instead reflected Chui's merger in her own mind of the two meetings that day, I remain fully persuaded from the record as a whole that there were indeed two meetings, one at 2:15, one at 4:15, separated by Chui's consultations with Balabus, *supra*.

²⁸ In the trial, Balabus testified that Barajas continued at all times to deny that she had signed the agreement form. However, Balabus' personal notes of the meeting (Jt. Exh. 15), which she prepared minutes after the meeting had concluded, contain this entry: "She [Barajas] acknowledged her signature but insisted she didn't remember." In this instance, therefore, I rely on Balabus' recorded recollection.

²⁹ It is evident from her notes of the meeting (Jt. Exh. 15) that Balabus was skeptical of Alvarado's unique claim that Padilla/Hinojosa had "witnessed" Alvarado's punching in her own card. Thus, after recording Alvarado's statement, "My witness is Francisco [sic] Padilla," Balabus appended these parenthetical re-

what he had already done, should it come to that. He replied, as translated by Martinez, that he was “very comfortable.”

Balabus also did these things on February 17: She reported to Yoshimoto that she had interviewed the trio, that they were denying any proxy-punching on the 15th, that there was a “possibility of a witness, Ms. Padilla,” and that Balabus would “try to reach her.” Later the same day, Balabus had an assistant call the housekeeping department to locate Padilla/Hinojosa and ask her to come to Balabus’ office. However, Padilla/Hinojosa never appeared, neither that day nor on the following Tuesday morning, the 21st, when, on Balabus’ return from the 3-day holiday weekend, she again made a similar effort to have Padilla/Hinojosa summoned to her office.

On either February 17 or the following Tuesday morning, February 21, Balabus also did these things: She conferred with other managers who served with her on an existing “executive committee” and asked if they were aware of any instances of proxy-punching in their departments, or reports thereof. She drew a blank in each case. She also reviewed personnel records for prior instances of “Separations for Misconduct,” and prepared a summary list of these instances. (So far as Balabus could discern from her review, although the Respondent had fired at least 15 employees in the previous 4 years for such varied offenses as “Insubordination,” “Missing Funds,” “Removing Property [belonging either to a guest or to the hotel] Without Authorization,” and “Intoxication,” no one had previously been fired for a proxy-punching violation or any other violation of the timecard rules and procedures.) (But neither, for that matter, did she discover any instances where any employee had been accused of such a violation.) However, she learned that at least one employee—Jose Reyes—had been fired in 1991, prior to the introduction of the new timeclock rules and procedures in 1993, for falsifying his hand-kept “sign-in sheet,” the records then relied on by the Respondent’s payroll department for pay-computation purposes.)

After again hearing nothing from Padilla/Hinojosa on the morning of February 21, and with the deadline for a decision now imminent, Balabus concluded from all she had seen and heard and read so far that, despite the protestations of innocence by the trio, Reyes had been truthful in reporting that Salinas had proxy-punched others’ cards on the 15th, and that it must have been Alvarado’s and Barajas’ cards that she had punched.

She soon reported these conclusions to Yoshimoto, bringing Chase with her, who concurred in her conclusions. She emphasized in this regard her judgment that Reyes seemed quite credible and serious in his report of what he had witnessed firsthand, and that, by contrast, the trio had seemed unconvincing and shift in their denials and collateral claims. She also presented Yoshimoto with the “documentation” she had by then assembled, including the “agreements” each of the three had signed acknowledging that they had read the timecard rules, the timecards of the suspect trio, the written statements signed by Chui and Reyes, her own handwritten notes of her interview with the trio, and the list of “Separation[s] for Misconduct” over the previous 5 years.

Balabus also recommended to Yoshimoto that, to be “consistent,” and “fair” to the other employees, dismissal was the appropriate penalty. Yoshimoto reviewed the documentation Balabus had set before him, and agreed (reluctantly, he

insists) with both her conclusions about the guilt of the trio and her recommendations they be dismissed. As to the question of the trio’s guilt, Yoshimoto relied on Balabus’ assessments of their unimpressive performances during her interview with them, and seems to have been especially impressed that Reyes had “come forward,” without any prompting, or any apparent reason to lie, or any apparent ulterior motive that might cast doubt on his truthfulness. As to the appropriateness of dismissal as the penalty, Yoshimoto reasoned, in substance, that the offense was “serious,” in that it implicated issues of employee honesty, and that, inasmuch as this was apparently the first instance of a witnessed and reported proxy-punching violation, the hotel could not afford to treat it lightly or brush it under the rug, for fear of creating a “precedent” that might send the wrong message to other employees and might thus compromise the integrity of the timeclock-based payroll system.

Soon after this, the alleged discriminatees were notified by telephone of Yoshimoto’s decision. Some 5-1/2 months later, the Union filed the instant charge.

III. THE TRIO’S PREVIOUS UNION ACTIVITIES; EXTENT OF MANAGEMENT KNOWLEDGE

The Union has been trying to organize the Respondent’s hourly workers since sometime in 1992, and Alvarado, Salinas, and Barajas appear to have been among a relative handful of its early supporters. On this record, however, it appears that the Union’s organizing efforts did not become public until 1994, when it orchestrated at least two large organizing rallies and marches in the area of the New Otani, one in March and one in July, each attended by some employees of the New Otani (including the alleged discriminatees) as well as by local labor activists, sympathetic public officials, and representatives of the local television and newspaper media. However, as of the conclusion of this trial, the Union had never petitioned for an election, and the Respondent’s own petition seeking an election, filed on August 25, 1994, in Case 21—RM—2595, was eventually dismissed by the Regional Director on an uncertain date, for reasons not disclosed by this record.³²

Alvarado was admittedly known to the Respondent’s main actors at the time of her dismissal as an activist in the Union’s organizing campaign. These are some of the relevant background details: In 1994 Alvarado had distinguished herself in both the March and July rallies by addressing the ralliers through a bullhorn from an elevated perch. The March rally was held in front of the hotel, around a fountain, and was attended by about 200 people in all, among whom were about 80 of the Respondent’s employees, including Barajas and Salinas, who hoisted banners or picket-signs bearing pronoun messages.³³ Clips of Alvarado’s speech

³² A copy of the Respondent’s RM petition is in evidence as G.C. Exh. 6. I have not made administrative inquiry into the precise timing or reason given by the Regional Director for dismissing the RM petition, but I rely on the General Counsel’s representation on brief (Br. 32 fn. 31) for my finding that the RM petition was, indeed, dismissed.

³³ As noted below, Yoshimoto and Balabus denied any awareness of the union activities or sympathies of Salinas and Barajas. While the record contains no direct evidence to the contrary, I note that Alvarado recalled seeing both Yoshimoto and Balabus standing in-

Continued

during the March rally were broadcast on a local television news show, and the Japanese/English-language newspaper for the Little Tokyo community, *The Rafu Shimpō*, published a front page story of the rally which included a brief interview with Alvarado (identifying her as “Ann Alvarado, the New Otani Hotel’s supervisor of housekeeping”), and in which Alvarado was quoted as saying that the workers wanted “more respect” from the management. Alvarado was also pictured in a photograph adjacent to the article, standing next to a speaker with a bullhorn who was then addressing the ralliers.

The Respondent customarily distributed copies of the *Rafu Shimpō* in the hotel, and Yoshimoto admittedly had made it a point, “since the union organizing campaign started,” to collect newspaper and magazine articles relating to the campaign, which he kept in what he sarcastically called his “smart book.” Indeed, Yoshimoto, “believed” that he had read the *Rafu Shimpō*’s story about the March 1994 rally, and admittedly was aware of Alvarado’s union activism in any case. The record contains independent evidence clearly establishing the point even in the absence of his ungarded admission. For example, Alvarado’s uncontradicted testimony shows that, at an uncertain point before the first of the small group picketing episodes in the fountain plaza in the summer of 1994 (*infra*), Alvarado had approached Yoshimoto directly, in the company of about seven other prounion workers,³⁴ and asked him if it would be okay for the employees to leave the hotel proper to conduct picketing during their lunch breaks. According to Alvarado, whom I substantially credit, Yoshimoto told the delegation that this would be “okay by him but we had to go without uniform because the half an hour is not paid, so we can do whatever we want.”

The second large rally was held on an uncertain date in July, apparently before the other events described immediately below. Alvarado was again a speaker, and Salinas and Barajas, among others, participated in the rally and displayed prounion signs or placards. The record contains few other details associated with that rally, except that it was again attended by a large and varied group of participants (including, presumably, the merely curious), and that one of the speakers other than Alvarado was a Los Angeles City Councilperson, the Honorable Richard Alatorre, whose only relevant testimony when called as the Union’s witness in this trial was to confirm two points never in dispute—that there was such a rally, and that Alvarado was a speaker.

On July 21, 1994, apparently not long after Alvarado had spoken at the second of the large rallies, she and another employee-supporter of the Union, Argelia Ortiz, received 3-day disciplinary suspensions for “insubordination.” The suspensions traced from an incident 2 days earlier, when Alvarado and Ortiz had admittedly broken into some kind of “disciplinary” meeting being conducted by Yoshimoto with two other workers. The only details of the underlying events were provided by Yoshimoto. His account, although itself somewhat skeletal and impressionistic, was not materially contradicted by Alvarado or by Ortiz in their own summary references to the same events on cross-examination. Relying on

side the window of the Azalea restaurant which fronted on the site of the March rally, apparently observing the rally activities, a recollection that was not denied by either Yoshimoto or Balabus.

³⁴ The employee group did not include either Salinas or Barajas.

Yoshimoto unless I note otherwise, I find as follows: On July 19, 1994, Yoshimoto was meeting with two employees whose names, apparently, were Dixie Magana and Dora Cruz,³⁵ and who were somehow involved in some kind of dispute. (There is a suggestion in the record, but no more, that the dispute may have traced from a union-related argument between the two.) Also present were Executive Housekeeper Chui and Director of Human Resources Balabus. As the meeting was underway, Alvarado and Ortiz, although uninvited, entered the meeting and said they wanted to serve as “witnesses” to “protect” Cruz.³⁶ Yoshimoto said they weren’t needed and asked them to leave, which they refused to do even after he then instructed them at least once more to leave. When they wouldn’t leave, Yoshimoto then had Balabus call the security department to send someone up to remove them, but before security personnel arrived, the two uninvited workers finally left.

In the aftermath of this incident Yoshimoto personally instructed that Alvarado and Ortiz be issued a disciplinary suspension for 3 days for their “insubordination” in refusing to leave when first ordered to do so. And in a memorandum to each of them accompanying their notices of disciplinary suspension, Yoshimoto spoke, *inter alia*, of his “extreme disappointment in your witnessed unprofessional behavior[,]” while also stating, “[s]hould you have anything constructive to add to my management of this Hotel, my door is always open to employees.”

Yoshimoto does not claim that he was unaware of the apparently close connection between Alvarado’s and Ortiz’ organizing activities for the Union and their actions in trying to attend, and then refusing to leave, the July 19 meeting. And even if he had not already made this connection, it would have been apparent to him as soon as he read the July 30, 1994 issue of *The Rafu Shimpō*,³⁷ which carried a story about the disciplining of Alvarado and Ortiz under the headline, “Tension Escalates Between New Otani and Union Or-

³⁵ Yoshimoto was led by company counsel’s suggestion to identify Dixie Magana as the employee in the meeting whose actions were the targets of scrutiny. However, Alvarado implied on cross-examination (see next footnote) that Dora Cruz was the targeted worker. It may be that each worker had been making accusations against the other, and that Yoshimoto had called both of them on the carpet to explain their dispute.

³⁶ On cross-examination of Alvarado, the Respondent’s counsel suggested that Dixie Magana was the worker Alvarado and Ortiz were bent on protecting. Alvarado corrected him, however, and insisted that Dora Cruz was the worker whom they were trying to “protect” by serving as her “witness.” Curiously, however, counsel for the General Counsel asserts on brief (Br. 41) that Alvarado was there to “witness the discipline of Union supporter Dixie Magana.” But counsel does not identify any basis in the record for this claim, which is actually two claims—first that Alvarado was there to protect Magana; second, that Magana was a “fellow Union supporter.” I reject the first claim in the light of Alvarado’s testimony. As to the second claim, for which the General Counsel cites no evidence of record, I note that Balabus admittedly believed that Magana was outspokenly prounion. However, with the record in this confused state, I can draw no meaningful conclusions whatsoever about whose interests Alvarado and Ortiz may have been trying to protect by intervening in the meeting, much less what the underlying issue may have been.

³⁷ Union Exh. 1.

ganizers.”³⁸ In that story, the Union’s staff representative, Jennifer Skurnik,³⁹ was quoted at length on the matter of the suspensions and the roles of Alvarado and Ortiz as key in-house organizers, and the point is best illustrated by her quoted statement that “[t]his anti-union move [the suspensions] is the latest in a long list of retaliatory attacks made on hotel union leaders since Local 11’s organizing campaign began more than a year ago.”⁴⁰

In this latter regard, I further note as follows: The record contains no evidence of any “long list of retaliatory attacks made on hotel union leaders” since the 1992 inception of the Union’s organizing effort.⁴¹ But it may be presumed that the Union, having thus publicly charged the Respondent with having “retaliated” against its in-house leaders Alvarado and Ortiz, would have then filed such a charge with the Board. However, the record does not show whether or not any such charge was filed, much less how it may have been disposed of. In any case, the complaint never attacked the July 21 disciplinary suspensions of Alvarado or Ortiz as unlawfully discriminatory, nor did the General Counsel give any other form of notice that she might make such a contention.

Despite this, however, in a summary passage in the prosecution brief notable more for its coyly oblique quality than for the soundness of the uncertain argument within, counsel for the General Counsel now suggests not only that Yoshimoto’s disciplining of Alvarado and Ortiz can be taken as evidence of his supposed antiunion “animus,” but that Alvarado’s and Ortiz’ actions on July 19 were statutorily “protected” activities.⁴² However, the General Counsel’s de-

³⁸ Yoshimoto made a point of collecting such articles, and I infer that he read the “Tension Escalates” article, especially considering, as I discuss below, that he had been interviewed for and purportedly quoted in this one.

³⁹ Skurnik also appeared in this trial as the Union’s representative; however, she offered no testimony.

⁴⁰ For obvious reasons, I give no substantive weight to Skurnik’s quoted claims. Relatedly, I note that Yoshimoto, too, was quoted in the article as purportedly saying that “[t]he situation was getting out of hand and they [Alvarado and Ortiz] needed some kind of disciplinary action. . . . I had to do it for the protection of all the other employees who were being harassed by those two and other pro-union people.” The quotes attributed to Yoshimoto in the article clearly cannot be relied on to prove that Yoshimoto’s quoted assertions were true, for they are plainly hearsay for that purpose. Neither can his quoted remarks be cited as evidence of a nonhearsay admission by Yoshimoto, for the record lacks foundation through a witness with firsthand knowledge that Yoshimoto made the quoted remarks. Accordingly, the only weight I give to the article is that it was an obvious medium through which Yoshimoto would have learned, if he did not know it already, that Alvarado’s and Ortiz’ actions in trying to attend the July 19 meeting were “union-related” activities.

⁴¹ The record vaguely suggests that the Union has filed several charges during the course of its protracted organizing campaign among the Respondent’s employees, but it likewise suggests that the instant charge concerning the dismissals of Alvarado, Barajas, and Salinas are the only ones that led to issuance of any complaint. While these questions could be resolved by administrative inquiry, no party has suggested such an inquiry, and I have made none.

⁴² Thus, invoking Yoshimoto’s announced “disappointment” over Alvarado’s and Ortiz’ actions on July 19 as the factual centerpiece of her argument, the General Counsel goes on to say this (Br. 41; my emphasis):

Although Yoshimoto does not refer to Alvarado’s Union activity in the letter [i.e., the memoranda to Alvarado and Ortiz

fense of the former proposition is, at best, circular, and her defense of the latter proposition is nonexistent. In the circumstances, I will not attempt to guess about, much less analyze the merits of, whatever theory the prosecution may now have in mind. It suffices to observe that where there is no apparent basis for finding that the two employees had a statutory right to attend the meeting in the first place, there is likewise no apparent basis for finding that their refusal to leave the meeting was “protected” activity. But in any case, given the known facts, it would be difficult, if not analytically impossible, to infer merely from Yoshimoto’s known reactions to their refusal to leave that he bore any “animus” whatsoever against his employees’ union activities, as distinguished from their insubordinate refusal to leave the meeting when ordered by Yoshimoto to do so.⁴³

As already noted, Barajas and Salinas, although less conspicuous as advocates for the Union than Alvarado became in 1994, were hardly invisible in that role. They had attended both the March and July 1994 large rallies, and, with Alvarado, they had also participated with a smaller group of six or seven other hotel workers in occasional lunchtime picketing in the summer of 1994 in a fountain plaza of the New Otani, where they say they saw hotel “security” employees standing by, with portable radios in hand. However, both Balabus and Yoshimoto denied knowing at the time of their discharges that either Barajas or Salinas favored the Union, and the most that Chui would concede is that she believed that Salinas was prounion, but didn’t have any belief at all as to where Barajas stood on the issue. There is no direct evidence to the contrary, even though it is apparent alone from their participation in public rallies and in the small group picketing episodes that any of the Respondent’s key

wherein he expressed his “disappointment”), it has been found that personal dislike or animosity for an employee is discriminatory *where, as here, it stems from knowledge of protected activity. Yesterday’s Children, Inc.*, 321 NLRB 1 (1996)]

⁴³ Without in any way questioning the holding of *Yesterday’s Children*, or its reasoning or any of its *dicta*, I remain unpersuaded that the cited case has any applicability to the known facts in this case. In this regard, I note first that although counsel for the General Counsel has avoided being explicit on the point, she is clearly implying in the passage quoted in the last footnote that the disciplining of Alvarado and Ortiz, being a response to their supposedly “protected” activities, was itself an *unlawfully* retaliatory act. (You can’t reasonably assert in the same breath, (a) that the July 19 actions of Alvarado and Ortiz were protected activities, and (b) that Yoshimoto’s “disappointment” was traceable to those protected activities, without necessarily implying also that the disciplinary action taken by Yoshimoto *because* of that “disappointment” was itself unlawfully retaliatory.) But plainly, it could only be by finding that the workers’ activities were protected in the first instance that I could find that Yoshimoto’s “disappointment” over their activities—and his acting on that disappointment by disciplining them—betrayed *antiunion* animus, as distinguished from a mere animus against “insubordinate” behavior by employees, without regard to whether that behavior may be in some way union related. And what is finally lacking in the General Counsel’s argument here—or elsewhere in the prosecution brief—is any defense of the General Counsel’s bare claim that the two workers’ actions in refusing to leave the meeting when instructed by Yoshimoto were “protected” activities. Thus, I regard the whole passage in the end as an afterthought, indeed, as an inconclusive stab in the dark, wholly unsupported by any coherent legal theory or body of evidence, and one not worthy of further consideration.

actors herein—Chui, Balabus, and Yoshimoto—could have gained knowledge of Salinas’ and/or Barajas’ union sympathies from any number of persons who witnessed those conspicuous activities, had any of them wished to learn such things. In any case, all three management actors credibly denied that the subject of the union activities or sympathies of any of the three was ever discussed between or among themselves in their various interactions leading to Yoshimoto’s decision on February 21 to fire the trio.

Considering the record as I have just summarized it, especially the absence of direct evidence showing otherwise, I find that Yoshimoto’s decision to fire the three was reached with clear awareness of Alvarado’s prounion role, but without any knowledge or belief as to the union activities or sympathies of Barajas or Salinas. I reach the same finding regarding Balabus’ extent of awareness of these things at the time of her involvement in the discharges. However, I emphasize that even if their knowledge as to Barajas and Salinas had been more clearly demonstrated, this would not change my ultimate finding that the General Counsel has failed to establish a credible threshold case that the employees’ union activities were a motivating factor in Yoshimoto’s decision to fire them or in Balabus’ own recommendation that they be fired.

Moreover, before moving on, I record these points of fact: First, none of the alleged discriminatees was clearly shown to have conducted any union activities at any point after the summer of 1994. Similarly, so far as this record shows, the Respondent’s own filing on August 25, 1994, of a petition for an election seems to have roughly coincided with the Union’s abandonment of high profile activities such as demonstrations, rallies, and picketing. Thus, if the Union—or any of the alleged discriminatees—persisted at all in any organizing activities after the summer of 1994, they must have been conducted well beneath the Respondent’s radar screen.

Analysis; Supplemental Findings; Conclusions of Law

IV. THE GENERAL COUNSEL’S BURDEN

The teachings of *Wright Line*, supra, must govern my analysis. Under that case, as already noted, it is the General Counsel’s threshold burden to “make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” Accordingly, lacking such a “prima facie” showing, the complaint can be dismissed on this basis alone; likewise, it is only when such a showing can be found in the credible record that it may become necessary to the ultimate decision to determine whether the employer has nevertheless made out a defense under *Wright Line*, i.e., to determine whether the employer has, nevertheless, “demonstrated that the same action would have taken place even in the absence of the protected conduct.” Moreover, although the Board’s phrase, prima facie showing, might imply, standing alone, that the General Counsel’s burden is merely one of “coming forward” in its case-in-chief with some evidence pointing in the direction of bad motive—and has drawn criticism in some circuits for this reason⁴⁴—the Board elsewhere made it clear in *Wright*

Line itself that the General Counsel’s burden is actually one that remains with the prosecution throughout the trial, and does not shift.⁴⁵ (The Supreme Court likewise so held in its approval of *Wright Line*’s analytical scheme in *Transportation Management*, observing in the process that the General Counsel’s burden requires proof of the “motivating-factor” element by a “preponderance” of the evidence in the record as a whole.⁴⁶ In short, the General Counsel’s burden in these cases is an ultimate burden of “persuasion” as to the “motivating-factor” element, not merely a burden of “coming forward.”⁴⁷

Beyond this, as the Board recently affirmed in *Columbian Distribution Services*,⁴⁸ the prosecution must establish the existence of four factual “elements” to satisfy its threshold burden under *Wright Line*, namely, “union or protected activity, knowledge, animus, and adverse action.”⁴⁹ Accordingly, I must assume for purposes of my analysis below that, absent proof by a preponderance of each such “element,” the General Counsel’s case must be dismissed.

V. ADEQUACY OF THE GENERAL COUNSEL’S SHOWING

A. Union Activities, Knowledge, and Adverse Action

Two of the four “requisite elements” have been clearly established: The alleged discriminatees were involved in “union or protected activity” (most notably, in the summer of 1994), and the Respondent took “adverse action” against them when it fired them in late February 1995. In addition, the element of “employer knowledge” of those activities is clearly established in Alvarado’s case. However, I have found that Balabus and Yoshimoto, the company agents most involved in the decision to fire the three, were both unaware, in fact, of either Salinas’ or Barajas’ union activities or sympathies at the time this decision was reached. Nevertheless, I acknowledge that if a sufficient showing had been made that the Respondent harbored antiunion animus, then its admitted knowledge of Alvarado’s union activities might enable an argument that the combination of these two elements warrant the inference that the decision to discharge all three was tainted by hostility against Alvarado. Accordingly, it is not necessarily fatal to the General Counsel’s case that Yoshimoto and Balabus may have been unaware that Salinas or Barajas were likewise prounion.⁵⁰ However, as I discuss

of Workers’ Compensation v. Greenwich Collieries, 512 U.S. 267 (1994). See also *Schaeff Inc. v. NLRB*, 113 F.3d 264 (D.C. Cir. 1997), where the circuit court recently suggested that the practical effect of *Greenwich Collieries*, supra, may be no more than the abandonment of the expression “prima facie case” to describe the General Counsel’s burden under *Wright Line*. 155 LRRM at 2332 fn. 5.

⁴⁵ 251 NLRB at 1088 fn. 11.

⁴⁶ *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 398–399 (1983).

⁴⁷ *Manno Electric*, supra at fn. 12, reaffirming this understanding.

⁴⁸ *Columbian Distribution Services*, 320 NLRB 1068 (1996).

⁴⁹ *Id.* at 1070–1071, citing *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

⁵⁰ In substantial agreement with the Respondent’s argument, however, I judge that on this record, it would require an unreasonable stretch to suppose that Yoshimoto would have gotten rid of two other longstanding employees of the hotel, Barajas and Salinas, simply to rid himself of known union activist Alvarado, especially when, as of February 21, 1995, union organizing activities at the

⁴⁴ See, e.g., *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), discussing *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995), and the Supreme Court’s decision in *Office*

next, with supplemental findings, the evidence on which the General Counsel relies for her general assertion that “the Respondent’s on-going animus . . . is abundantly clear from the record”⁵¹ is evidence that I find, instead, is either quite innocuous or, at best in some instances, too equivocal in its implications to plausibly support a finding that even Alvarado’s known union activities were a motivating factor in Yoshimoto’s decision to fire the trio.

B. *Animus*

I have already considered and rejected the General Counsel’s attempt to claim that an antiunion animus on Yoshimoto’s part can be inferred from his disciplining of Alvarado and Ortiz on July 21, 1994, for their insubordinate refusal to leave the July 19 meeting involving Magana and Cruz. But this is only one among several circumstances cited by the General Counsel on brief as evidence of animus. I now address those additional circumstances:

1. Testimony of Alvarado regarding Chui’s and Hollis’ remarks

The General Counsel cites Alvarado’s testimony that Chui made what might be called a “cautionary” reference to Alvarado’s union activities during an annual appraisal meeting between the two sometime in “May 1994,” more than 8 months before Yoshimoto fired her. Thus, Alvarado recalled that Chui said, *inter alia*, that Alvarado had “good points,” and that Alvarado was, indeed, “one of the best supervisors that she ha[d],” but also told Alvarado “that she knew about [Alvarado’s] union activity,” and said in this vein that Alvarado should “be careful” about whom she “spoke to.” Alvarado recalled, moreover, that she received a 30-cent-per-hour raise “after” receiving this appraisal from Chui, and I infer that Chui’s positive appraisal of Alvarado had something to do with this raise.

Chui, whose only appearance on the witness stand preceded Alvarado’s, was never called back either to confirm or deny having made some such “be careful” warning to Alvarado during the May 1994 appraisal session. I recall here that Chui made no bones in her own testimony about her awareness of Alvarado’s highly conspicuous role as one of the Union’s chief, in-house organizers. Accordingly, I find it quite plausible that Chui could have mentioned this to Alvarado, and I assume for these purposes that she did. I retain doubt, however, that Alvarado reported either the context or the substance of Chui’s remarks with complete accuracy. (It’s the “be careful” part that troubles me, not least because Alvarado conveniently places the same words in Hollis’ mouth, as I discuss below.) But even if I were to accept Alvarado’s testimony here as literally accurate, I could not find in it any plain indication of hostility on Chui’s part against Alvarado for her union activities; indeed, I think the best interpretation of Alvarado’s fragmentary recollection is that Chui was implying that she didn’t care that Alvarado was prounion, but was concerned that Alvarado may have offended some of the other employees in her attempts to enlist

their support for the Union, and therefore should “be careful” lest she might further alienate such employees. And clearly in any case, it involves straining this modest and temporally remote evidence beyond its tensile limits for the General Counsel to rely on it as proof that antiunion animus was a motivating factor in Yoshimoto’s decision, taken more than 8 months later, to fire Alvarado.

The other incident involving Alvarado cited by the General Counsel shares these same ultimate weaknesses. Thus, Alvarado testified that on another occasion on an uncertain date (she said first it was sometime in “1994,” but then recalled, somehow, that it was actually in “January 1995”), she was again warned to “be careful” about her union activities—this time by a “room director” named John Hollis, who was no longer employed by the Respondent at the time of this trial, and whom no party called as a witness. On this occasion, according to Alvarado, Hollis called Alvarado aside in the cafeteria where (in Alvarado’s words), “He told me that somebody saw me [post] on the bulletin board a leaflet from the union and he told me that I had to ask permission from the personnel office first[,] and I told him that I didn’t know because I saw so many employees put some notes, they selling car or homes[,] over there. So he told me again that it had to be ask first permission and to be careful.” Again, even assuming the literal truth of Alvarado’s reporting, its strains credulity to cite this incident as substantial evidence of antiunion animus even on the part of Hollis; much less does it plausibly suggest the existence of some overarching animus that pervaded every judgment made by any management agent who might have had occasion to deal with Alvarado or any other union activist. Indeed, it would be wholly speculative to rely on this incident as evidence that union activities were a motivating factor in Yoshimoto’s decision to fire not just Alvarado, but Salinas and Barajas as well.

2. Testimony of Manuel Alvarado and Argelia Ortiz regarding Yoshimoto’s remarks at March 1 meeting

The final evidence of supposed animus cited by prosecuting counsel traces from certain remarks allegedly made by Yoshimoto in a speech to the Respondent’s entire employee complement after the three housekeepers had been discharged. The General Counsel here cites the roughly harmonious features in the testimony of 2 of the approximately 200 or more employees in attendance, Manuel Alvarado (no relation to Ana), and the previously mentioned Argelia Ortiz. In fact, however, counsel for the General Counsel relies solely on Manuel Alvarado’s account when she asserts on brief that Yoshimoto said, among many other things, that the Union was “no good,” and “only wanted [the workers’] money.” And it is this version which, as the General Counsel sees it, supplies proof of sufficient antiunion hostility on the part of Yoshimoto himself to warrant the inference that the same animus infected his decision to fire the trio.

I note, however, that Ortiz recalled instead that what Yoshimoto said was, “It’s okay with me if you want the union, no problem, but I just want to let you know that they will only try, you know, to get your money away.” And if the difference between the two versions mattered to the question of animus (and I don’t think it does), I would

hotel had been in a stage of dormancy, if not abandonment, for roughly 6 months, and, therefore, Alvarado’s erstwhile union activities would not appear to have presented any particular threat to the Respondent as of February 21.

⁵¹G.C. Br. 40.

unhesitatingly credit Ortiz,⁵² whose version clearly negates any suggestion of animus that might be inferred from Manuel Alvarado's account, viewed in isolation.

Both witnesses further recalled, moreover, that Yoshimoto announced that the "reason" he was holding the meeting was to respond to "rumors" that the three housekeepers had been fired because of their union activities. And on this point, they each recalled, in substance, that Yoshimoto said this was not true, and explained further that they had been fired for violating the rule against proxy-punching, which was like "stealing" from the company (Alvarado), and that, although he had tried to be "fair to everybody," he "had to follow the policies of the hotel," and that if he had "let them get away with th[is] . . . people would take advantage" (Ortiz).

I find that Manuel Alvarado's truncated version of this meeting as offered during the General Counsel's direct examination of him is in several respects unreliable, especially so as to the claim that Yoshimoto's announced reason for holding the meeting was to address rumors surrounding the dismissal of the alleged discriminatees. However, I substantially credit his recollections of what Yoshimoto said on the subject of the dismissal of the three housekeepers when that subject eventually arose (near the end of the meeting, as I further find below). My reaction to Ortiz' version is similar, although I think her account, to the extent it varies from my further findings below, represented a more sincere attempt on her part to accurately describe what she recalled of the meeting.

However, for a more complete understanding of what Yoshimoto said about the purposes of the meeting, and the context of his union-related remarks, I find, relying on Balabus' more coherent and complete memory, that Yoshimoto did conduct a mass meeting of employees—on March 1—in which he did seek to dispel certain "rumors," but that the subject of the dismissal of the housekeeping trio was not among the rumors he focused on in the meeting. Rather, I find, the latter subject came up incidentally, after Yoshimoto had concluded his scripted speech, when questions emerged from various employees. Specifically, relying chiefly on Balabus, and on the script which she credibly testified was used by Yoshimoto during his speech,⁵³ I find that the "rumors" he sought to dispel were (a) that he was "leaving this hotel" (which he assured them he had absolutely no intention of doing, except in the sense of "going home for the evening"), and (b) that "the hotel is going to be sold" (which he denied as lacking in "one drop of truth").⁵⁴

⁵² I retain many doubts about Manuel Alvarado's overall reliability; my doubts are based largely on his demeanor and his recurrent tendency throughout his testimony to editorialize or digress from his narrations in ways that seemed calculated, however naively, to aid the prosecution case.

⁵³ R. Exh. 59.

⁵⁴ The background to this, as Balabus explained it, was as follows: Mr. Otani [the Respondent's owner] had been here for a visit, and he was very encouraged by the trend of the economy going up. There were a lot of rumors going around at that time that the hotel was going to be sold and Mr. Yoshimoto was being, quote-unquote, shipped back to Japan. And he [Yoshimoto] was concerned about that.

Finally, I find, Yoshimoto did make the following statements at the conclusion of his speech relating to union activities at the hotel, both remote and recent, all of which were simultaneously translated into Spanish by Elena Shinnick:

The last item that I want to talk to you about . . . is the activities of a union. There is a union that tried to organize the employees of this hotel some thirteen years ago. We eventually got a secret ballot election and the hotel won by a margin of about 10 to 1. At the time that we won, we told the employees that their wages were comparable to or better than the wages of workers in similar positions in other hotels in this area, many of which were nonunion, many of which were union. Furthermore, our employees' job security has always been better. This is the truth. Period.

At that time the union predicted that when they lost the election, we would reduce wages, reduce benefits, and there would be a great deal of turnover. What happened? Wages went up, benefits remained stable, and the turnover here at the New Otani remained much better in the sense that it is far lower than other hotels. That means that we terminate fewer people than other hotels, and fewer people quit.

The Union wants me to come in and sign an agreement to recognize them. I don't want to do that. . . . So I have instructed our lawyers to try and get the NLRB to order a secret-ballot election. We may or may not be successful in getting an election. The Union does not want an election because they know you do not want to pay your hard-earned money to the Union.⁵⁵ Instead, they want the hotel to recognize the Union without allowing you to vote.

We have told the Union that we are confident our employees don't want a union and we are willing to let the NLRB come in and conduct an election. So maybe we will have one, maybe we won't. If we don't have an election it will be the Union's fault, because it is the Union opposing our request for an election. . . . A decision to be union or nonunion will be reflected in the wishes of all our employees.

It was after Yoshimoto made these scripted remarks, I find, that questions and challenges arose from some of the employees in the audience relating to the discharge of the three housekeepers, and in response to which, I find, Yoshimoto stated, in substance, that the dismissal of the trio had nothing to do with union activities, but instead was linked solely to their involvement in a proxy-punching arrangement, and to the Respondent's need to be strict in its enforcement of its rule prohibiting proxy-punching, lest other employees might get the wrong message from any leniency and thus "take advantage."

The following findings arguably bear more closely on the General Counsel's contentions relating to alleged "disparate

⁵⁵ I deem it probable that it was these remarks that both Manuel Alvarado and Ortiz had vaguely in mind when Alvarado recalled that Yoshimoto said that the Union "only wanted our money" and Ortiz recalled that he said that the Union would "only try . . . to get your money away."

treatment” (discussed in the final section, *infra*) than they do on the existence of animus. However, I place them here to complete my findings about events at the March 1 meeting that may be of arguable significance to any or all of the parties.⁵⁶

After Yoshimoto explained why he had fired the three alleged discriminatees, Manuel Alvarado spoke up from the floor, and asked Yoshimoto, in substance, whether he would fire any others who were guilty of proxy-punching, to which Yoshimoto replied, “Yes.” Alvarado then added that he had seen an (unnamed) “engineer” in the hotel punching-in someone else’s timecard. Yoshimoto then asked Alvarado in reply, “Why didn’t you report this to the personnel [office]?”⁵⁷ Alvarado then said that this would do no good because “they never listen.”⁵⁸ Ortiz then spoke up, echoing the latter sentiment. At some nearby point, Juan Castro, an employee in the Security Department, likewise said something to Yoshimoto implying he had knowledge of a proxy-punching violation, and Yoshimoto gave him an answer similar to that he had given Alvarado.

C. Conclusions; the Significance of the Absence of Animus

I have already said that the General Counsel’s evidence of animus is either quite innocuous or, at best in some instances, too equivocal in its implications to plausibly support a finding that Alvarado’s known union activities were a motivating factor in Yoshimoto’s decision to fire the trio. I haven’t changed my mind. The foregoing evidence is, in my final judgment under *Wright Line*, far too weak to justify the “inference” that anyone’s union activities were a “motivating factor” in Yoshimoto’s decision to fire the trio. And with this finding that the General Counsel has failed to estab-

⁵⁶ These findings are based on the harmonious and credible features in the testimony of Manuel Alvarado and Ortiz, with preference for Ortiz’ recollections to the extent they differ from Alvarado’s. Balabus was not only present throughout the March 1 meeting, but present throughout this trial, as the Respondent’s trial representative, and thus she saw and heard the testimony of Alvarado and Ortiz now in question. On cross-examination, Balabus acknowledged having heard both Alvarado and Ortiz raise questions at the conclusion of the March 1 meeting, and she was not invited thereafter to contradict what the former witnesses reported.

⁵⁷ I rely on Ortiz for this quote, with emphasis on her recollection that Yoshimoto referred to the “personnel” office.

⁵⁸ Alvarado was referring to an incident which, as he testified elsewhere, had occurred some uncertain number of weeks before the trio was fired. In that incident, says Alvarado, he saw an “engineer” known to him only as “Norman,” punch-in “about three” timecards. Alvarado admittedly did not report this to anyone at the time, “because,” he said, “I thought that they wouldn’t believe me because, you know, I’m pro-union and I didn’t think they would . . . care.” This explanation was delivered so lamely, and is so motivationally improbable in the known circumstances, that I utterly reject it as a reason for Alvarado’s failure at the time to “report” the alleged incident. On the other hand, I think his admitted “pro-union” stance may well account for the fact, discussed elsewhere below, that, at some uncertain point after the March 1 meeting, Alvarado did come forward with his “report” about “Norman.” Significantly, however, he did not tell his story to the “personnel office” (i.e., to Balabus or a subordinate), but instead carried it to the hotel’s security director, Jake DeLeon, where it either languished, or was passed on by DeLeon to Director of Engineering Chase, who admittedly took no further action.

lish the “requisite element” of animus, the case ends here, and the complaint must be dismissed on this basis alone.⁵⁹

Admittedly, however, I have not yet addressed either the facts or the arguments on which the prosecution seems to place heavy ultimate reliance, all centering on the claim that the alleged discriminatees were the victims of “disparate treatment.” I have deferred the subject until now because it is my judgment, elaborated below, that absent some direct, independent, and convincing proof that the Respondent harbored significant antiunion animus (and I have found none-such), the existence of arguably uneven treatment by different supervisors in their handling of reports of alleged timecard violations cannot reasonably be relied on alone to supply an “inference” that union activities were a “motivating factor” in the Respondent’s dismissal of the discriminatees. But I have never seen the Board clearly endorse this reasoning, and against the possibility that the Board or another reviewing body would prefer to decide the case with the benefit of findings as to alleged disparate treatment, I turn next to that issue:

VI. DISPARATE TREATMENT CONTENTIONS

A. General Significance, and the Limits Thereon, of Disparate Treatment Evidence

It is impossible to be categorical about the proper role of evidence of arguable disparity in treatment in unfair labor practice cases requiring a *Wright Line* analysis. But it is possible to advance some modest generalizations, grounded both in our common administrative experiences with such cases in the private sector, and in our common personal experiences with employing entities of all kinds:

Clearly, in many cases, evidence that an employer has applied and enforced a rule against a known union activist, while overlooking instances of identical or substantially comparable misconduct by employees who are known to be antiunion, or whose sympathies on the subject are unknown, can serve to reinforce an ultimate conclusion that the employer committed unlawful discrimination. But in most such cases where such evidence is cited in support of the ultimate conclusion, if not all of them, there is independent proof of the “elements” (union or other protected activity, knowledge, animus, and adverse action) necessary for the General Counsel to carry its “prima facie” burden under *Wright Line*. Accordingly, the value of the disparate treatment evidence lies principally in its tendency to rebut the employer’s own attempt to carry its now-shifted burden under *Wright Line* of demonstrating that it would have taken the same action against the activist even absent his or her union activities. And as I discuss next, there are good reasons, grounded in our common experience, for thinking generally about disparate treatment evidence in a *Wright Line* case as rebuttal evidence, and not as evidence that will, by itself, sustain the General Counsel’s threshold burden.

First, let us define the category to be discussed below more tightly, by excluding those situations where the proffered evidence of disparate treatment requires the embracing of a flawed analogy, i.e., a comparison between apples and oranges (“The manager wouldn’t let me go home early to watch the Rangers match, but he let Bob off to take his wife

⁵⁹ *Columbian Distribution Services*, *supra* at 1070–1071.

to the hospital.’’) Let us instead define the category to be discussed to include only those situations where the cited disparity of treatment when it comes to rule—enforcement is blatant, i.e., involves a plain failure by the employer or its supervisory or managerial agents to treat equally—situated employees equally.

Next, we need to remind ourselves that even with the category thus confined to blatant disparity in rule—enforcement among equally—situated employees, the phenomenon is not uncommon in the workplace. Indeed, the phenomenon can often be found to occur even in the smallest businesses, and becomes increasingly inevitable the larger the employing entity, the greater the number of employees, the greater the number of supervisors responsible for them, and the greater the number of administrative layers between those at the top who make and declare rules and policy and those at the bottom of the supervisory hierarchy who are charged with enforcing the rules day to day in their respective departments.

Next we must acknowledge that even when such blatant disparities in treatment can be found to exist, the disparity can often be explained in terms that do not necessarily implicate concerns under the National Labor Relations Act, even if they might in certain cases implicate other laws, e.g., Title VII of the Civil Rights Act, where discriminatory “motive” is not a necessary element. These reasons can range from a given floor-level supervisor’s or higher manager’s ignorance of the employer’s rules or policies, through situations where the supervisor or a higher manager is aware of and attentive to the rules, but believes, rightly or not, that they don’t apply in a given instance, to situations where the acting official, although quite conscious of the rules, and careful to enforce them against employees in most instances, consciously chooses to ignore them in a given instance to serve some interest deemed to be overriding in the circumstances. And even in those latter situations, the interest sought to be served could range from the merely innocuous in terms of the NLRA (“Even though she broke the rule, I’m giving her a pass, because she’s my sister-in-law”) to the unlawfully discriminatory (“Even though he broke the rule, we’ve got to give him a pass because he’s our swing vote against the Union in the election next Tuesday”).

Next, it is only in the latter cases, involving conscious deviation from the known rule in a given instance, that we may rationally question whether the employer really “cares” as much about the rule that is purportedly applicable to all as might otherwise appear from the existence of the rule itself. (The former situations do not reasonably suggest this; they only suggest that the employer isn’t doing a good enough job of making its rules clear, or of conducting the kind of oversight necessary to ensure common practices among all supervisors and managers.) And again, it is only one of several possibilities in the latter cases that the reason for the variance in the rule—enforcement might be an unlawful one—and then it is only one of many possibilities that the unlawful reason might be one which implicates our statute.

The foregoing amounts to a long way of saying that, absent independent proof of the employer’s antiunion animus, even evidence of actual, conscious disparity of treatment by an employer or its agents when it comes to rule—enforcement is generally not a reasonable basis for inferring that the employer’s enforcement of the rule in a given instance against an employee who has engaged in union activities

known to the employer was motivated in any way by the employee’s union activities. There are simply too many other explanations for such phenomena that do not raise concerns under the Act.

These reminders have particular application to this case and to the grab-bag of anecdotes and other evidence cited by the General Counsel that I will review below. Before reviewing that evidence, however, I record my ultimate judgment that none of this evidence, nor all of it considered as a whole, persuades me that the Respondent’s main actors in this case—Chui, Balabus, and Yoshimoto—or any one of them, was generally more tolerant of alleged violations of the proxy-punching rule than the rule itself might suggest. Indeed, I judge that the evidence does not ultimately tend to undermine in any significant way the plain inference derivable from the rule itself, reinforced by the testimony of Chui, Balabus, Yoshimoto—and by nearly all of the General Counsel’s witnesses, as well—that proxy-punching is a serious violation in the Respondent’s eyes, and that “immediate dismissal” is the presumptive penalty for any employee found to have been involved in proxy-punching.

I also record in advance my principal reason for reaching these ultimate judgments concerning the General Counsel’s evidence of alleged disparate treatment: None of the Respondent’s central actors in this case—Chui, Balabus, and Yoshimoto—was ever shown to have been aware of any such evidence when they acted against the alleged discriminatees. Indeed, they each testified affirmatively (and quite credibly) that, as far as each knew, the report made by Reyes that he had just seen Salinas proxy—punch the cards of two or more other workers, represented the first and only such instance of a witnessed violation since the rule had gone into effect in 1993.

B. The Evidence of Arguable Disparate Treatment in this Case

1. Preliminary note

Some of the evidence provided through the General Counsel’s witnesses concerned incidents or alleged incidents that were so remote in time (i.e., clearly arising prior to the effective date of the proxy-punching rule in September 1993) as to be essentially valueless in terms of assessing Chui’s, Yoshimoto’s or Balabus’ motivations in late February 1995, even if they had been aware of these remote instances, which they were never shown to have been. I will not address any such evidence. Other testimony was of a merely anecdotal or gratuitously confessional kind, and concerned incidents or supposed incidents that were never shown to have come to the attention of any supervisor or managerial official of the Respondent. I will likewise ignore such evidence. Other testimony was confusing as to timing, details and surrounding circumstances, but concerned incidents that either clearly arose since the effective date of the proxy-punching rule, or may have occurred around the time the rule was first publicized, but in any case concerned situations where the alleged violation of the rule was brought to the attention of one or more supervisors or department managers in one way or another (but never to Balabus or Yoshimoto, nor even to Chui, in whose department, incidentally, there is no evidence whatsoever of any proxy-punching violation other than the

supposed violations by the alleged discriminatees). It is this latter category of evidence on which I focus below.

2. Manuel Alvarado's evidence

I have already noted that Manuel Alvarado testified that he saw an "engineer" known to him only as "Norman" punch-in "about three" timecards on an uncertain date in the weeks preceding the trio's dismissal. I have further found that Alvarado made a general reference to this (but naming no names) when he spoke up at the March 1 meeting conducted by Yoshimoto, and that Yoshimoto responded by asking why Alvarado had not reported the incident to the "personnel" department. I pick up the story at that point:

Alvarado testified that, after the March 1 meeting, he conferred with security guard Castro (who was not called as a witness), and then, "about a week" later, that he and Castro went together, not to the "personnel" office, but instead to Castro's supervisor, Jake DeLeon, the head of the security department (who also was not called as a witness). There, Alvarado said he told DeLeon "what [he] had seen ['Norman' do] that day." (From the absence of any indication to the contrary, I infer that Alvarado did not indicate to DeLeon the actual date of the incident he claims to have witnessed.) Alvarado recalled that DeLeon then asked, "How come [you] didn't report it[.]" and that he replied that he didn't think anyone would "believe" him or "care." DeLeon took some notes, according to Alvarado, and told him he would send a "memo to Mr. Yoshimoto as soon as he came back from his vacation."⁶⁰ A week or so thereafter, according to Alvarado, he queried DeLeon in some way about the matter and DeLeon did not respond. Then, says Alvarado, about 3 weeks after that, Alvarado approached DeLeon again, and DeLeon, without waiting even for Alvarado to question him, told Alvarado that he "hadn't heard anything," and walked away.

3. Antonio Orozco's evidence

Antonio Orozco, a waiter in the Azalea Restaurant, testified about an incident that he initially said had occurred "about two an[d] a half years" earlier. In context, Orozco seems to have been referring to a time roughly 2-1/2 years before his October 2, 1996 appearance at the trial, i.e., sometime in or around April 1994.⁶¹ However any reliance on this interpretation is misplaced, for Orozco testified on cross-ex-

amination that he couldn't be sure even that the incident occurred before the three housekeepers were fired, and acknowledged it could have been after that date. Indeed, considering other evidence discussed below, all suggesting in the aggregate that, in the aftermath of the housekeeping trio's dismissal, there emerged a great deal of mutual finger-pointing by "rival" groups or individuals working in the Azalea Restaurant, I deem it probable that the incident discussed next occurred during that period of finger-pointing that occurred after the dismissal of the three housekeepers.

The matter of timing aside, this, in substance, is what Orozco recalled about the underlying incident itself: On whatever day it was, Orozco was told by Argelia Ortiz that she had heard from yet another employee, "Luis," that yet another employee known to Orozco as "Mercedes" had arrived late to work in the restaurant, but that yet another worker, "Jaime," had proxy-punched her card at shift-start time to cover for her lateness.⁶² Relying on this information, and angered by it, Orozco went to Azalea Restaurant Manager George Salamonides and reported to him what he had heard about "Mercedes," but not naming either his own alleged informant, Ortiz, or those of any others supposedly involved at some firsthand or near-firsthand level. However, according to Orozco, Salamonides brusquely dismissed Orozco's concerns, advising him to the effect that he shouldn't "worry" further about it or trouble to "get involved."

Lacking any contrary testimony from Salamonides, I credit Orozco that he delivered some such report to Salamonides and that Salamonides did not appear to be moved to take any action on the basis of it, and indicated this by some kind of dismissive reply. (I wonder if Salamonides' apparent unwillingness to take action might not have had something to do with the obvious evidentiary frailties in Orozco's third- or fourth-hand report, but in the end, no such finding is necessary.)

4. Rudy Majano's evidence, as supplemented by Kitti Bhao-Intr

At all material times, Rudy Majano was a cook in the Azalea Restaurant, where Kitti Bhao-Intr, a man born and raised in Thailand,⁶³ was one of three chefs, and an admitted supervisory agent of the Respondent. Prior to the introduction of the new timeclock rules in March 1993, Majano occasionally punched in the timecards of some of his fellow kitchen workers, including the timecard of Hector Flores. In this era, as the record independently shows, the hourly employees' pay was computed on the basis of hand-completed timesheets, but not on the timecards that some workers, including kitchen workers, were also required to punch at a timeclock. The timecard records were then used mainly as a convenient way of determining quickly whether an employee was in the hotel, in the event an emergency or disaster required such ready information.

Majano's proxy-punching in that era was apparently suspected by chef Bhao-Intr, for, as Majano testified, sometime

⁶⁰ Although I received this evidence over the Respondent's objection as a nonhearsay admission of a party under Rule 801(d)(2)(e) that might support a finding that DeLeon actually did send such a "memo" to Yoshimoto, I make no such finding, especially considering my doubts concerning Alvarado's overall reliability, and his seeming tendency to edit and shape his recollections in ways calculated to aid the prosecution's case. However, in the light of the testimony of Engineering Director Chase, who summarily acknowledged without further detailing that he had gotten some such report about "Norman" (Nielson's) alleged proxy-punching, I would be more inclined to find that DeLeon was the source of that report, and that DeLeon had made it only to Chase, who admittedly took no further action.

⁶¹ On brief (Br. 36), counsel for the General Counsel somehow interprets this same testimony as allowing a finding that the incident described by Orozco occurred "about six months before the three housekeepers were fired[.]" i.e., around September 1994. I reject this interpretation as unsupported by any reliable evidence.

⁶² Ortiz was not asked to corroborate any of this when called as the General Counsel's witness.

⁶³ The absence of vowels in "Intr" does not reflect a typographical error; this is how Mr. Bhao-Intr spells that part of his name.

around April 1993, after the new rules banning the practice had been announced, Bhao-Intr approached Majano and asked if he had recently punched in Flores' timecard. Majano acknowledged that he had, and Bhao-Intr told him that he must now "take care," because the practice "is illegal." There is no evidence that Majano ever again proxy-punched for anyone, much less that Bhao-Intr was personally aware of any such continuing activity on the part of either Majano or anyone else.

Bhao-Intr, called as a nominally adverse witness by the General Counsel, did not deny Majano's story, and I therefore credit it. Bhao-Intr further acknowledged, although in highly generalized terms, and with little attention to dates or sequences, that it was common, especially in the period immediately after the three housekeepers were fired, for him to receive reports from kitchen workers accusing others in the kitchen of timecard or other timekeeping violations. Speaking generally, he said he believed that these reports were symptomatic of ongoing "ethnic rivalries" or personal "feuds" among different groups in the kitchen, unrelated to union sympathies, but which had engendered a lot of "finger-pointing."

Thus, in one such instance, he recalled that a trio of workers (whom he named, but I will not) complained to him that another group of workers had been clocking-in and -out for one another. (Bhao-Intr did not name the group of accusers, and he said that the trio of accusers named only some of the names in the group of accusers.) Bhao-Intr personally examined the timecards of the named accusers, and later asked them if any had proxy-punched for another, which all denied. Bhao-Intr then went back to the trio of accusers and asked if they were prepared to come forward as "witnesses," and they all said they were not, and pleaded with him not to "mention" their "names" because they didn't want any "trouble." Bhao-Intr took no further action; nor did he report the original accusations to Balabus or anyone else in upper management.

In another instance of uncertain timing and surrounding circumstances, Bhao-Intr recalled that he investigated someone's report that Maria Padilla (presumably the same person previously identified as now going by the surname "Hinojosa") had proxy-punched for someone. His investigation satisfied him that there was no truth to the report, and he took no further action.

Finally, Bhao-Intr recalled that, in the aftermath of the three housekeepers' dismissal for supposed proxy-punching, Adriana Estrada, a kitchen worker known to him as a supporter of the Union, came to him and confessed that "a long time ago," she had been guilty of proxy-punching for someone, and was fearful she might now get in trouble for it. She assured Bhao-Intr that she would "never do it again." Bhao-Intr kept this confession to himself.

5. The combined evidence furnished by employees Jose Contreras and Librado Vidaurri, and by Food and Beverage Director Akira Yuhara

At material times, Jose Contreras and Librado Vidaurri were "stewards" in the kitchen of the Azalea Restaurant, where they were among about 5 workers on any given shift who were responsible for cleaning the kitchen. One of these was a steward named "Pantaleon," whose alleged activities were the primary focus of the General Counsel's evidence

discussed below, although Pantaleon did not himself appear in this trial.

Librado Vidaurri's brother, Daniel Vidaurri (who likewise did not testify in the trial) was the "supervisor" (or "chief steward") of the kitchen stewards, although it is entirely uncertain on this record whether the title carries with it any of the supervisory powers set forth in Section 2(11) of the Act. Daniel Vidaurri reported to one or more of the chefs in the restaurant, and/or to the Respondent's food and beverage director, Akira Yuhara, who had special oversight and "greeter" responsibilities in the Azalea Restaurant, because he is a native of Japan and because the restaurant, which featured Japanese cuisine, was heavily patronized by a Japanese clientele.

The stories told by witnesses Contreras, Librado Vidaurri, and Yuhara are each in their own way quite confusing either as to timing, specific context, or other surrounding details; and they are mutually contradictory as to some details, most notably, timing. However, this much is certain and agreed on by all witnesses: Contreras and Pantaleon were parties to a longstanding feud, marked by intermittent hostile exchanges, threats and challenges between the two. (According to prosecution witness Librado Vidaurri, it was particularly Contreras—also a prosecution witness—who posed a "constant discipline problem.") The feud became so disruptive that it eventually caused Steward Supervisor Daniel Vidaurri to ask Food and Beverage Director Yuhara to participate in a meeting with the antagonists to try to clear the air and to make peace between them.

Contreras and Librado Vidaurri gave vague and conflicting estimates of the timing of significant antecedent events, but their mutual testimony implied a sequence in which Contreras, over the course of a few days, first witnessed Pantaleon twice punch in the cards of another kitchen worker,⁶⁴ then mentioned this to Chief Steward Daniel Vidaurri, who soon arranged the meeting over which Yuhara would preside.

When did this sequence begin? On brief, the General Counsel, relying on one of Contreras' estimates, places Contreras' supposed witnessing of proxy-punching by Pantaleon as occurring "sometime in mid-1995."⁶⁵ Inexplicably, however, the General Counsel concedes in a later passage that the meeting with Yuhara at the end of the sequence did not occur until January 18, 1996,⁶⁶ nearly a year after the dismissal of the three housekeepers. The General Counsel relies for the latter assertion on Yuhara's specific testimony, itself informed by reference to his dated notes of the meeting. Implicitly, therefore, the General Counsel seems to concede that at least 6 months—not merely a matter of days—intervened between Contreras' alleged witnessing of Pantaleon's proxy-punching and the meeting at which he reported the same to Yuhara, as described next.

Ignoring Contreras' hopelessly garbled versions of events at the meeting (as does the General Counsel on brief), and primarily relying instead on Yuhara's recollections (ditto), I

⁶⁴ I see no reason for deciding whether or not Contreras was credible when he testified that he did see Pantaleon punch the cards of others on two occasions of uncertain timing. Again, the proper focus is on what he told his supervisors and managers, and what they did or did not do about it, and why.

⁶⁵ G.C. Br. 36.

⁶⁶ *Id.*, p. 37; and see also *id.* at fn. 37.

find as follows concerning the events at the meeting: Pantaleon, Contreras, and the Vidaurri brothers spoke Spanish, and Yuhara spoke English. Daniel Vidaurri served as the translator. The exchanges were again marked by mutual finger-pointing. Pantaleon said that when he served as an acting chief steward, Contreras would not “follow his orders,” and wasn’t helpful to other stewards. Pantaleon also complained that whenever a problem would arise between the two, Contreras would challenge him to go outside and fight. He also accused Contreras of having punched-in his timecard on a “Sunday,” when, in reality, he had not been at work. (Pantaleon never specified to Yuhara whether the supposed incident had occurred recently, or in the distant past.) Contreras then rejoined that he had seen Pantaleon punch-in the timecard of another worker. (Apparently, he was referring to the incidents he had allegedly witnessed in “mid-1995,” but if so, he, too, did not specify to Yuhara when these alleged events had occurred.) Contreras went on to accuse Pantaleon of “stealing bread,” and of “selling cassette tapes,” as well. Eventually, Yuhara took over; he asked each antagonist whether he had committed the timecard infractions alleged by the other, and each denied the others’ accusation. He also pressed Pantaleon about the alleged bread-stealing, and cassette-selling, and Pantaleon denied doing the latter, but admitted that he had taken home stale, or leftover bread from the kitchen on one or more occasion. Eventually, Yuhara and Daniel Vidaurri together delivered the effective message that the two must get along better in the future, and the instruction apparently stuck, for, according to Yuhara, there was no further trouble between the two in the aftermath of the meeting.

For his part, Yuhara formed the opinion that the various accusations each had made against the other regarding timecard violations were unreliable, and merely a product of their ongoing feud. And taking that view of the situation, he never pressed for details, nor did he thereafter advise Balabus or Yoshimoto of these accusations.

CONCLUSIONS OF LAW

I have already noted that the complaint must be dismissed because the General Counsel failed to persuade by a preponderance of credible evidence in the record as a whole that the Respondent bore any significant animus against its employees’ union activities, which showing, is in, turn, one of the requisite elements to be established in meeting the prosecution’s threshold burden under *Wright Line* of establishing that such union activities were a motivating factor in the Respondent’s dismissal of the three housekeepers. I have already explained why the foregoing evidence of supposed “disparate treatment” is too weak and insubstantial to substitute for the missing element of animus. In all the circumstances, I conclude as a matter of law that the General Counsel has not carried its *Wright Line* burden.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁷

⁶⁷If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

APPENDIX

MEMORANDUM OPINION

RE: ORDER DENYING CHARGING PARTY’S MOTION TO REOPEN RECORD

In the decision to which this memorandum is attached, I have denied the motion of the Charging Party herein (the Union) to reopen the record. The background, and my principal reasons for denying the motion, are set forth below:

The Motion

The Union’s motion to reopen the record, dated July 24, 1997, was received as the attached decision was in the final stages of preparation. Although the service sheet attached to the motion reflects that it was served on counsel for the General Counsel and the Respondent, neither of those parties has, to date, filed any opposition or other responsive papers. The thrust of the motion is that the Union has evidence of events in May and June 1997 that the Union argues would tend to show that the three alleged discriminatees in the case under submission (the housekeepers) were the victims of “disparate treatment” when they were fired on February 21, 1995 for their supposed involvement in a proxy-punching arrangement more fully described in my decision. In support of this motion the Union has tendered an “offer of proof” which contains three basic averrals of fact, as follows:

(1) On two (apparently different but unspecified) dates in “May” 1997 certain (named) “cooks” made “reports” to their (unnamed) “managers” that two of their (unnamed) “fellow cooks” (the latter characterized as “known antiunion adherents”) had each contrived to steal time from the company in different ways, neither of them by the device of proxy-punching.

(2) On June 10, 1997, “approximately 30 workers had a meeting . . . to report the violations” to General Manager Yoshimoto and other (named) upper-level managers, including Director of Human Resources Balabus. (The offer of proof does not specifically aver that any such intended “report(s)” were actually delivered, or if so, by whom, or in what manner.)

(3) “To date, the Hotel has taken no action” on “the reports,” and “[n]one of the employees who reported the violations has been contacted to be interviewed.”

The Union further states in a footnote to its motion that it is “prepared to present the evidence contained in its offer of proof in any form determined appropriate by the administrative law judge, whether by direct testimony of the witnesses before the ALJ, through the investigative procedures of the Region, or in any other manner.” And the Union further represents that it is “concurrently offering to present the witnesses to Region 21 to give testimony concerning the events which are the subject of this motion.”

In seeking an order from me to reopen the record, the Union invokes two provisions in the Board’s Rules and Regulations, Section 102.24, which deals generally with how,

when, and where to file motions, depending on the status of the case, and Section 102.48 (d)(1) whose caption refers, inter alia, to “extraordinary postdecisional motions” (my emphasis). The Union’s motion to reopen does not arrive at a postdecisional stage, and therefore, as a technical matter, it is not properly filed “under” Section 102.48(d)(1). But this is not fatal, for under Section 102.35(8), prior to a decision and a transfer of the case to the Board, an administrative law judge is expressly empowered, inter alia, “to order hearings reopened.”

Reasons for Denying Motion to Reopen

I have denied the Union’s motion to reopen for the following reasons, any one of which, I judge, is sufficient:

1. In my decision, I have found that the General Counsel’s showing, notably lacking in proof of any distinct antiunion animus on the part of the Respondent, was insufficient to warrant an inference that the union activities of the housekeepers, or of any one or more of them, were a “motivating factor” in the Respondent’s decision to fire them on February 21, 1995, and, therefore, that the General Counsel failed to sustain its threshold burden under *Wright Line*. In a related supplemental discussion, I recorded the reasoning leading to my judgment that, absent independent evidence that would sustain the General Counsel’s threshold burden, mere proof of alleged “disparate treatment” could not be relied upon to supply the requisite elements lacking in the General Counsel’s showing. Accordingly, even if the Union’s proffered evidence concerning events in May-June 1997 were credited after full litigation in a reopened hearing, this evidence could not properly be relied upon to find that union activities were a motivating factor in the Respondent’s decision, taken some 2-1/2 years earlier.

2. The evidence the Union seeks to adduce in a reopened hearing, relating to alleged recent events in May-June 1997 involving restaurant employees working in the Food and Beverage Department, is too remote in time from the events at issue in this case to bear significantly on the question of the Respondent’s motives when it dismissed the housekeepers, who worked in a different department, under a different manager and supervisor.

3. Setting aside the vagueness in some of the Union’s representations as to its intended proof, the Union’s proffer ap-

parently involves the Respondent’s alleged tolerance of or indifference towards “reports” of alleged misconduct by employees taking forms other than proxy-punching. Accordingly, if the proffered evidence can be said to have any significance at all in terms of assessing the Respondent’s motives when it fired the housekeepers for supposed proxy-punching in mid-February 1995, any such significance would depend on the validity of the Union’s attempt to analogize the recent alleged misconduct to that attributed to the housekeepers in mid-February 1995—an analogy that would appear to be vulnerable to the same criticism that attends attempts to compare apples to oranges.

4. There are indications that the Union’s motion was filed before the situations which it has invoked have fully ripened. Thus, in the end, the Union claims only that, “to date,” the Respondent has taken no “action” to pursue the “reports” it has allegedly received of alleged recent misconduct by “known antiunion adherents.”

5. Litigation must end at some point. And if a trial record is to be reopened whenever the General Counsel or a charging party in a case such as this one, which turns on employer motive, avers that a recent occurrence might change the trier-of-fact’s assessment of the employer’s motives at a much earlier historical moment, it is doubtful that litigation of such cases would ever end. The risk is especially present where, as here, each new instance of alleged disparity in an employer’s handling of a recent instance of alleged employee misconduct would predictably give rise to a new motion by one or both of the prosecuting parties to reopen the record.

6. Under the statutory scheme, the General Counsel has virtually unreviewable discretion to determine whether a Charging Party’s claims warrant submission to an administrative law judge for adjudication; indeed, under Section 3(d) of the Act, it is implicit that the General Counsel must perform a preliminary “screening” of claims before reaching that determination. And especially where, as here, the Union has apparently not yet tendered to the General Counsel any of the witnesses or the evidence on which it relies in support of its motion to reopen, it would undermine the statutory scheme for an administrative law judge to bypass the General Counsel and to conduct his or her own “inquest” into such claims.